

OCT 23 1976

MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

October Term, 1976

No. 76-5774

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

JOHN G. LANCIONE  
SPANGENBERG, SHIBLEY, TRACI, LANCIONE  
AND MARKUS  
1500 National City Bank Bldg.  
Cleveland, Ohio 44114  
*Attorneys for Petitioner*

## TABLE OF CONTENTS

Table of Authorities .....	1
Opinions Below .....	1
Jurisdictional Statement .....	2
Question Presented .....	2
Constitutional Provisions .....	2
Statement of the Case .....	3
Argument in Support of Granting the Writ .....	8
Conclusion .....	22
Appendix:	
Judgment Entry of the Supreme Court of Ohio (July 28, 1976) .....	A1
Opinion of the Supreme Court of Ohio (July 28, 1976) .....	A2
Journal Entry of the Court of Appeals (July 10, 1975) .....	A26
Opinion of the Court of Appeals (July 10, 1975) ....	A27
Judgment Entry of the Court of Common Pleas Re Summary Judgment (April 29, 1974) .....	A47
Judgment Entry of the Court of Common Pleas (April 29, 1974) .....	A48
Record Filed in the Court of Common Pleas:	
Complaint (July 2, 1973) .....	A49
Answer (October 2, 1973) .....	A51
Motion for Summary Judgment by Defen- dant, Scripps-Howard Broadcasting Company (March 11, 1974) .....	A53
Exhibit A—Affidavit of George J. Masur ....	A54
Exhibit B—Affidavit of David F. Patterson ..	A56
Exhibit B-1—Transcript of Script re Film Clip .....	A57

## TABLE OF AUTHORITIES

## Cases

<i>Beckley Newspapers Corp. v. Hanks</i> , 389 U.S. 81 (1967)	18
<i>Canessa v. J.I. Kislak, Inc.</i> , 97 N.J. Super. 327, 235 A.2d 62 (1967)	11
<i>Cantrell v. Forest City Publishing Co.</i> , 419 U.S. 245 (1974)	19
<i>Cox Broadcasting v. Cohn</i> , 420 U.S. 469 (1975)	19, 20
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)	13, 16, 18
<i>Dietemann v. Time, Inc.</i> , 284 F. Supp. 925 (C.D. Cal. 1968)	14
<i>Ettore v. Philco Television Broadcasting Corp.</i> , 229 F.2d 481 (3rd Cir. 1955)	11, 21
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	15
<i>Gautier v. Pro-Football, Inc.</i> , 304 N.Y. 354, 107 N.E.2d 485 (1952)	9
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	8, 18, 19, 20
<i>Greenbelt Cooperative Publishing Assn. v. Bressler</i> , 398 U.S. 6 (1970)	18
<i>Haelan Laboratories v. Topps Chewing Gum</i> , 202 F.2d 866 (2d Cir. 1953)	10
<i>Henry v. Collins</i> , 380 U.S. 356 (1965)	15
<i>Man v. Warner Bros., Inc.</i> , 317 F. Supp. 50 (S.D.N.Y., 1970)	9
<i>Monitor Patriot v. Roy</i> , 401 U.S. 265 (1971)	18
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	2, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 22
<i>Ocala Star-Banner v. Damron</i> , 401 U.S. 295 (1971)	18

<i>Price v. Hal Roach Studios Inc.</i> , 400 F. Supp. 836 (S.D.N.Y. 1975)	11
<i>Rosenblatt v. Baer</i> , 388 U.S. 75 (1966)	15
<i>Rosenbloom v. Metromedia</i> , 403 U.S. 29 (1971)	18
<i>Time, Inc. v. Firestone</i> , U.S. , 47 L. Ed. 2d 154 (1976)	8, 9, 10, 20
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	2, 7, 8, 9, 13, 14, 15, 16, 19, 20, 22
<i>Time, Inc. v. Pape</i> , 401 U.S. 279 (1971)	18
<i>Uhlaender v. Henricksen</i> , 316 F. Supp. 1277 (Minn. 1970)	11

## Constitutional Provisions and Statutes

§51 New York Civil Rights Law, Consol. Laws, c.6	9
Ohio Constitution - Article I, Section 2	5
28 U.S.C. §1257(3)	2
United States Constitution - Amendment I	2, 4, 5, 20, 21

## Treatises and Law Reviews

PROSSER, LAW OF TORTS (4th Ed., 1971)	10, 11
Pember and Tieter, <i>Privacy and the Press Since Time, Inc. v. Hill</i> , 50 WASH. L.R. 57 (1974)	10

# Supreme Court of the United States

---

October Term, 1976

No. ....

---

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

---

## **PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio**

---

Petitioner, Hugo Zacchini, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this proceeding July 28, 1976.

## **OPINIONS BELOW**

The opinion of the Ohio Supreme Court, appended hereto at page A2 is reported at 47 Ohio St. 2d 224.

The opinion of the Eighth District Court of Appeals of the State of Ohio, appended hereto as page A27 is not yet reported.

No written opinion was entered by the trial court in the Court of Common Pleas for Cuyahoga County, Ohio.



### **JURISDICTIONAL STATEMENT**

The judgment of the Supreme Court of Ohio was entered on July 28, 1976 under docket number 75-995.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

### **QUESTION PRESENTED**

Where a performer has a protected "right of publicity"—the right of exclusive control over his professional affairs—and that right is held as a matter of state law to have been infringed by a television station's filming of his entire act over his specific objection and the broadcasting thereof on a nightly news show, is the television station's tortious conduct immunized as a matter of law by the First Amendment of the United States Constitution as interpreted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

### **CONSTITUTIONAL PROVISIONS**

#### **United States Constitution—Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### **STATEMENT OF THE CASE**

The entire record in this action, which is reproduced commencing at page A49 hereof, consists of plaintiff's complaint, defendant's answer and defendant's motion for summary judgment supported by two affidavits and an exhibit.

Plaintiff's complaint, filed July 2, 1973, alleged that he is in the entertainment business; that he performs an act originated by his father and performed only by his family for fifty years; that while appearing at the Burton Fair he was approached by an employee of defendant with regard to filming his act and he requested that the performance not be filmed; that notwithstanding such request his entire performance was filmed and shown on defendant's television station; that "the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property".

Defendant's answer admitted that plaintiff's performance had been filmed and broadcast. However, it put at issue whether such had been done over the plaintiff's objection. In separate defenses the answer challenged the sufficiency of the complaint to state a claim upon which relief can be granted and alleged that its conduct was protected "by the rights of freedom of speech and freedom of the press as contained in that Constitution of the United States and the State of Ohio".

On March 11, 1974, defendant filed a motion for summary judgment. That motion was supported by two affidavits and an exhibit.

The first affidavit was from the representative of defendant who was responsible for plaintiff's act having been

filmed. That affidavit reflected that while at the Burton Fair on August 30, 1972 he had witnessed plaintiff's performance which "consisted of him being shot out of a cannon into a net located approximately 200 feet away". The affidavit further states that on that date the "plaintiff requested that his act not be filmed". The following day the affiant reported on his activities to the producer of defendant's Eyewitness News Program, including the fact plaintiff had objected to any filming, and he was directed to return to the fair and film plaintiff's performance. He did so, and submitted the film for use on that evening's eleven o'clock Eyewitness News.

The second affidavit was of a co-anchorman on the eleven o'clock Eyewitness News Program. He stated that on the program of September 1, 1972 a fifteen second news clip of plaintiff's act was televised, and identified the script text read while the film clip was being shown. The script was appended as an exhibit to the affidavit.

On April 29, 1974 an entry issued from the trial court granting defendant's motion for summary judgment. However, no opinion was issued upon such ruling so we do not have the benefit of the trial court's reasoning.

Plaintiff prosecuted an appeal to the Eighth District Court of Appeals. In that proceeding it was asserted that "appellee's conduct is not protected by the First Amendment", thus raising the question presented herein. On July 10, 1975 the court of appeals reversed the decision of the trial court. While the ruling of the three judges was unanimous, two separate opinions were rendered which proceeded on somewhat different grounds. Quite candidly, the opinions of the two judges went well beyond the issues which were briefed and argued, and certain of the points upon which reversal was based originated with the court.

The defendant then sought review in the Supreme Court of Ohio. The action was accepted for review, presenting as the appellant's first proposition of law that: A television station is privileged under Article I, Section 2 of the Ohio Constitution and the First Amendment of the Federal Constitution to film a public performance by a human cannonball and broadcast a fifteen second film clip of the performance on its news program.

On July 28, 1976 the Ohio Supreme Court issued its decision. The syllabus of opinion (through which the court officially speaks) is as follows:

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.

2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.

3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

In the course of the court's opinion the rationale of the Court of Appeals, and particularly those matters raised *sua sponte*, as to the foundation for an actionable claim for relief by plaintiff were essentially rejected. The court posed the controlling issues as it perceived them to be:



Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and, if so, was the television station privileged to do so?

As to the first proposition, the court held that the defendant's conduct constituted an actionable tort in Ohio. The right which the court found infringed was the "right of publicity", the first time such right had been recognized in Ohio. On this aspect of the action the court concluded as follows:

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, e.g., *Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.

We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area.

The court then proceeded to "the decisive issue in this case"—"whether the defendant had a privilege to film and televise the plaintiff's performance on its nightly news program, and if so whether that privilege was abused". For guidance on that issue the court turned to the rulings in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Based upon its analysis of those authorities the court concluded that defendant was entitled, as a matter of law, to immunity under a claim of privilege for its tortious conduct. Drawing from the two cited authorities the concept that the news media had a privilege to disseminate news of matters of public interest the court concluded thusly:

... it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that the taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point of view, that position is, of course, understandable, for a film or a videotape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. *No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public*

performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. (emphasis added)

Justice Celebrezze dissented from the court's decision. He asserted that the majority's reliance upon the *Time, Inc. v. Hill* and *New York Times* rulings was conceptually improper, and that even if relevant the failure to consider the effect of the later decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154 (1976), undermined the conclusions reached by majority. He further disagreed with the majority's determination that final judgment was proper, pointing out five factual issues which he maintained precluded a determination that defendant was entitled to summary judgment as a matter of law.

### ARGUMENT IN SUPPORT OF GRANTING THE WRIT

While this action might at first blush appear to be a simple continuation of the long-standing problem of resolving the conflicting interests of "free press" versus "right of privacy", and was treated as such by the Ohio Supreme Court in determining the same under the principles of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), petitioner submits that such is not the case. Petitioner contends

that this action presents a distinct question of first impression<sup>1</sup>, and that while it arises from a confrontation between the rights of the press and those of an individual the considerations which are represented in the line of authority flowing from *New York Times Co. v. Sullivan*, *supra*, through *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154 (1976), are so dissimilar to those presented in this suit as to render this Court's prior decisions inapplicable.

The trap into which the Ohio Supreme Court has fallen in arriving at its decision is one of relying upon labels: this action presents a conflict between "free press" and "right of publicity"; the "right of publicity" is a part of the "right of privacy"; *Time, Inc. v. Hill* dealt with the matters of "free press" and "right of privacy"; it therefore follows that the rule of *New York Times* as applied in *Time, Inc. v. Hill* should apply in this case. While such line of reasoning is superficially attractive it completely disregards the facts that the interests of the individual with which we are here concerned bear no relationship to those previously considered by this Court, that the underpinnings of the two cited authorities are not relevant to the fact situation presented herein, that the basis upon which liability might be imposed upon the press under those holdings could not be present in the context of this case, and that the law enunciated in those decisions has been modified by later rulings of this Court.

<sup>1</sup>Insofar as petitioner has been able to determine, there is not another reported decision in which the broadcast media's First Amendment privilege has been interposed and recognized as a defense to the total appropriation of a performer's right of publicity. The decisions in *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y., 1970) and *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) which bear some factual relationship to this suit, are distinguishable in that each was brought under §51 of the New York Civil Rights Law, Consol. Laws, c.6, and the courts held that such statute affords no protection for invasions of the right of publicity.



The most fundamental error of the Ohio Supreme Court is in not recognizing that the "right of publicity", while being categorized as a part of the overall "right of privacy", is an interest having such distinctive attributes as to require particularized individual consideration. Petitioner submits that in its approach to this case the Ohio Supreme Court has run afoul of this Court's recent warning that "[w]hatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded . . . may too often result in an improper balance between the competing interests" *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154, 164 (1976).

Dean Prosser, in his review of the "right of privacy", concludes that it is not one tort but a complex of four distinct kinds of invasion of four different interests which are tied together by a common name "but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff" PROSSER, *LAW OF TORTS* (4th Ed., 1971) p. 804. It is the failure to recognize the distinctiveness of the four separate torts which has led to confusion in decisional authorities. *Id.*, at p. 814.

While it has been said that for nearly twenty years the courts have been haunted by the "myth" that the tort of appropriation (which encompasses the right of publicity) involves an actual right of privacy, Pember and Teiter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L.R. 57, 88 (1974), there are several well-reasoned decisions which do observe the conceptual distinction which eluded the court below. One of the first cases in which the "right of publicity" was recognized is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), the court holding that such right was "in addition to and

independent of" the classical right of privacy. The same conclusion was reached by the Third Circuit in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1955). An oft-cited decision in this area, in which the court found the distinction between the right of publicity and other torts classified under the right of privacy to be of controlling importance, is *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (Minn. 1970). Quite recently it has been said:

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation on the other hand are different in theory and scope. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

See also, *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967).

What are these fundamental differences of which the courts and commentators speak? They are essentially that the tort of appropriation involves the commercial exploitation of a person before the public eye, whereas the traditional forms of invasion of privacy involve placing before the public either something theretofore secret or putting a "false light" upon facts previously known. PROSSER, *supra*, at p. 814. The "false light" doctrine is somewhat akin to, though not necessarily identical with, the torts of libel and defamation. As will be developed hereinafter, those distinctions should preclude the application of the authorities relied upon by the Supreme Court of Ohio, particularly in the factual context of this action.



Before undertaking a review of the decisions of this Court relied upon by the Ohio Supreme Court, and other rulings pertinent thereto, petitioner believes that the scope of the Ohio Supreme Court's ruling herein should be examined. Petitioner submits that while the decision of the Ohio Supreme Court appears to grant a qualified immunity, its effect is to virtually, totally insulate the broadcast media from liability. Of the two qualifications engrafted upon the basic immunity, one is a contradiction in terms while the other is a practical nullity.

The first exception as stated is that liability might attach if the "actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use". That proposition is a complete non-sequitur. If the "basic standard" of immunity is that the broadcast is of "matters reported [which] were of public interest" there is simply no room under that standard for a private use for purposes other than reporting. A finding that the broadcast was a reporting of a matter of public interest would in and of itself preclude a finding of private use. Therefore, any broadcast of a performance by a public personality would be exempt from potential liability. The implications of this are staggering. If the broadcast media is completely immune from liability from transmitting or reproducing all or parts of public performances it will be free to appropriate without compensation whatever it chooses. That contingency is virtually invited by the Ohio Supreme Court's holding that a standard which would bar the "reporting or depicting either an entire occurrence or an entire discrete part of a public performance" is constitutionally impermissible. In these times of ratings wars between television stations such an invitation might well be too tempting to resist.

The second qualification is that immunity would not be granted if "the actual intent was to injure the performer". How could such intent be proved, particularly in response to the obvious argument that added public exposure necessarily benefits the performer. Petitioner submits that this amorphous right of recovery is of no value whatsoever.

Such an immunity goes far beyond any rights heretofore granted the press by any court. It runs counter to admonitions from this Court as to sacrificing individual rights in the name of freedom of the press. This Court has recognized the validity of the proposition that:

Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight, and injured parties should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand. *Buckley v. New York Post Corp.*, 373 F.2d 175, 182. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

Justice Fortas, dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 420 (1967), expressed the matter thusly:

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this

Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be of no service to freedom of the press, but an invitation to public hostility to that freedom.

See also, *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968).

Let us now then turn to the prior rulings of this Court to determine whether the conclusions of the Ohio Supreme Court are mandated and/or appropriate thereunder.

While the primary authority drawn upon by the Ohio Supreme Court is the decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that ruling, in turn, draws from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is, therefore, appropriate that the inquiry start with the *New York Times* decision.

In *New York Times* the plaintiff had brought a libel action predicated upon an advertisement carried in the defendant's newspaper. The advertisement related to civil rights activities and, in part, was critical of certain police actions and public officials in Montgomery, Alabama. In his state court suit the plaintiff, a state official, recovered a \$500,000 verdict. Upon review before this Court the historical antecedents of the First Amendment privilege of the press were reviewed, and premised upon the reality that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'", *id.*, pp. 271-272, the rule was articulated that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that

the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, pp. 279-280.

Intervening between the *New York Times* decision and *Time, Inc. v. Hill* are the decisions in *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); and *Rosenblatt v. Baer*, 388 U.S. 75 (1966). In each of those cases the *New York Times* rule was applied to a fact situation involving criticism of public officials as to matters relating to their public positions. It is worth noting that in *Rosenblatt* the court referred to the "motivating force" behind the *New York Times* decision as protection for the "strong interest in debate on public issues" and the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". *Id.*, at p. 85.

We now arrive at *Time, Inc. v. Hill*, 383 U.S. 374 (1967). The plaintiff's action in that suit was predicated upon the "false light" theory of the right of privacy. The factual predicate was that Life magazine had reported on the opening of a play which was based on a book which was based on an actual event. The book, however, was a fictionalized version of the actual event and contained matter not responsive to the actual happening. The magazine article made it appear as though the plaintiff had suffered through the events portrayed in the fictionalized version. In an opinion expressing the views of five members of the court Justice Brennan found the principles of *New York Times* applicable. Premised upon the proposition that "the guarantees for free speech and press are not the preserve of political expression or comment upon public affairs", *id.*, at p. 388, that opinion states:

We create a grave risk of serious impairment of the indispensable service of a free press with the impos-



sible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait. . . . *Id.*, at p. 389.

The opinion notes, however, that the *New York Times* rule was deemed applicable only in the "discrete context" of the facts of the case, and there is a suggestion that if the facts were somewhat different it might not apply. *id.*, at p. 391. Justice Harlan, while concurring in the result, argued for a less stringent standard than that of *New York Times*. He observed that the fact situation did not entail the "market place of ideas" and that the plaintiff did not have the opportunity for rebuttal which a public official has as to criticism directed to his public affairs. *Id.*, at p. 407.

If we were to stop at this point, as did the Ohio Supreme Court, it would be evident that the principles upon which those decisions are based simply cannot apply to the instant case. Both *New York Times* and *Time, Inc. v. Hill* involved the dissemination of allegedly false information. In this case the dissemination is of a visual reproduction, a matter of truthful reproduction. The rule of law applied in those decisions permitted of a recovery upon proof that the defendant acted with knowledge of falsity or reckless disregard for the truth. No such consideration could apply herein. In *Time, Inc. v. Hill* a partial rationale for the immunity granted was the burden of absolutely verifying the accuracy of the information put before the public. Here that burden does not exist.

However, we cannot rest at this point, for further decisions of this Court make manifest the error of applying *Time, Inc. v. Hill* to this action.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the court ruled upon two actions which had been accepted

for review in order to consider the impact of *New York Times* upon persons who were "public figures" but not public officials. *Id.*, at p. 134. While agreeing upon the results in each action, the court was unable to agree upon a standard to be adopted. Justice Harlan, in an opinion joined in by Justices Stewart and Fortas, was in favor of a standard which would permit the imposition of liability upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers". *Id.*, at p. 155. Other justices urged the application of the *New York Times* standard, while Justices Black and Douglas argued for abandonment of *New York Times* in favor of total immunity for the press from libel suits. *Id.*, at p. 172. In the opinion of Justice Harlan the following is found:

. . . to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility [citation omitted] as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc. v. Hill*, *supra*, 385 U.S. at 390, we counselled against "blind application of *New York Times Co. v. Sullivan*. . . ." *Id.*, at p. 148. (emphasis added)

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. *Id.*, at p. 150.

The next significant decision of this Court was in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971)<sup>2</sup>. Its importance does not lie so much in what was decided (in fact the case was resolved by a plurality) but rather in its subsequent repudiation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The judgment of the court was rendered in an opinion by Justice Brennan, applying the *New York Times* standard to a charge of defamation brought by an individual who was involved in a matter of public concern. The point of departure among the justices was whether *New York Times* should apply to an individual who was neither a public official nor a public figure.

That issue was resolved within three years in *Gertz v. Robert Welch, Inc.*, *supra*. The plaintiff in that libel action was found to be neither a public official nor a public figure. The district court had entered judgment in the defendant's favor under the *New York Times* doctrine. The court of appeals affirmed that ruling "because it read *Rosenbloom* to require the application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed." *Id.*, at p. 330. That decision was reversed, this Court holding "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them". *Id.*, at p. 343. In response to the argument that adoption of a less stringent standard than that of *New York Times* would harm a free press the court stated:

<sup>2</sup>Between the *Curtis Publishing* and *Rosenbloom* decisions the *New York Times* rule was applied in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), *Greenbelt Cooperative Publishing Assn. v. Bressler*, 398 U.S. 6 (1970), *Monitor Patriot v. Roy*, 401 U.S. 265 (1971), *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971). However, each of those actions involved considerations basically similar to those of the *New York Times* case itself.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy on unconditional and indefeasible immunity from liability for defamation. [citations omitted]. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. *Id.*, at p. 341.

Petitioner submits that the clear import of *Gertz v. Robert Welch, Inc.* is a narrowing back of *New York Times* to the context in which the rule arose.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court rather clearly cautioned against too broad readings of *New York Times* and *Time, Inc. v. Hill*.

In *Cantrell*, a "false light" case, the court found that liability was properly imposed under the existing standards, but took the occasion to note that:

Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. 419 U.S. 245, pp. 250-251.



A similar caution was extended in the *Cox Broadcasting* ruling: "We should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph". 420 U.S. 469, 489. A fair reading of *Cox Broadcasting* fully reflects the narrowing of the *New York Times* standard as reflected in *Gertz v. Robert Welch, Inc.* In fact, Justice Powell in his review of decisional authorities in his concurrence observes that the *Gertz* decision "calls into question the conceptual basis of *Time, Inc. v. Hill*". 420 U.S. 469, 498.

The past term this Court refused to extend "the rather drastic limitations worked by the *New York Times*". *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154, 164 (1976). Petitioner submits that the *Firestone* opinion reinforces the limitations worked upon *New York Times Co. v. Sullivan*, *supra*, and *Time, Inc. v. Hill*, *supra*, by *Gertz v. Robert Welch, Inc.*, *supra*, which were completely ignored by the Ohio Supreme Court.

It should thus be evident that the Ohio Supreme Court's application of the *New York Times* standard in this case is a "blind application", as cautioned against by this Court almost ten years ago, and in total disregard of the latest constructions of the First Amendment by this Court. The doctrine of *New York Times* had its genesis in and is being returned to the protection of the right of the press to freely disseminate information regarding persons whose views and activities are of real importance to a vital on-going society. Without demeaning plaintiff's livelihood, Hugo Zacchini being shot out of a cannon is not one of the burning issues of our day.

Petitioner should not be understood as advancing the contention that, absent the protection of *New York Times*, defendant must be held liable. There can be no doubt

that defendant is entitled to some privilege under the First Amendment. The virtual total immunity granted by the Ohio Supreme Court, however, is not the answer. A middle ground must be arrived at.

Perhaps plaintiff's activities are of sufficient interest to the public to warrant some television coverage. Perhaps it was inevitable that such coverage would encompass broadcasting of his entire act. Perhaps plaintiff sustained no damage as a consequence of defendant's acts. Nevertheless, petitioner submits that those considerations are matters for a jury to resolve under a constitutional standard which properly recognizes the rights of the individual and the press.<sup>3</sup>

Petitioner recognizes that resolution of this action will, in all probability, require the formulation of new constitutional standards, which may be no easy task, and that at this point petitioner's arguments essentially present the negative of the case. Should review be granted, direction can be focused upon the formulation of an appropriate standard to replace that adopted by the Ohio Supreme Court. In this regard petitioner is drawn to the observation in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 490 (3rd Cir. 1955), that "Concededly the theory is a somewhat hazy one; but that is not unusual where the laboratories of the courts are working out the development of a new common law right". At the risk of being overly-dramatic, if the result of the work done in the laboratory of the Ohio Supreme Court is not to loose a Frankenstein monster upon the land further surgery must be performed upon its creation.

<sup>3</sup>While the facts of this case are such that the possibility of a *de minimis* argument might be advanced, the fact remains that the rule adopted by the Ohio Supreme Court would plainly have equal application to the filming and broadcasting of an entire performance by the Cleveland Symphony Orchestra at its open-air summer facility at the Blossom Center.



**CONCLUSION**

Petitioner submits that the decision of the Ohio Supreme Court here presented for review represents a misapplication of the First Amendment privilege of the press generally, and particularly represents an improper extension of *New York Times Co. v. Sullivan, supra*, and *Time, Inc. v. Hill, supra*, and prays that a writ of certiorari issue, that the final judgment entered herein be vacated, and that the action be remanded to the Common Pleas Court of Cuyahoga County, Ohio for further proceedings.

Respectfully submitted,

JOHN G. LANCIONE  
 SPANGENBERG, SHIBLEY, TRACI, LANCIONE  
 AND MARKUS  
 1500 National City Bank Bldg.  
 Cleveland, Ohio 44114  
*Attorneys for Petitioner*

**APPENDIX****JUDGMENT ENTRY OF THE SUPREME COURT  
OF OHIO**

(Decided July 28, 1976)

No. 75-995

THE SUPREME COURT OF THE STATE OF OHIO  
 THE STATE OF OHIO, CITY OF COLUMBUS

HUGO ZACCHINI,  
*Appellee,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Appellant.*

Judgment reversed.

# OPINION OF THE SUPREME COURT OF OHIO

(Decided July 28, 1976)

No. 75-995

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

HUGO ZACCHINI,

*Appellee,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,

*Appellant.*

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.
2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.
3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

APPEAL from the Court of Appeals for Cuyahoga County.

The plaintiff, Hugo Zacchini, is a "human cannonball." He performs the feat of being shot from a cannon into a net some 200 feet away. The entire performance lasts about 15 seconds.

In August and September of 1972, the plaintiff was regularly performing his act at the Geauga County Fair in Burton, Ohio. Each performance was staged in an open grandstand area for the pleasure of anyone attending the fair, and no separate admission was charged.

On August 30, 1972, a freelance news reporter for defendant Scripps-Howard Broadcasting Company, the owners of television station WEWS in Cleveland, attended the fair. Mr. Zacchini noticed the reporter and asked him not to film the performance. Although the reporter did not film the performance that day, he returned on the following day by order of the producer of defendant's Eyewitness News Program and videotaped the entire "human cannonball" act. WEWS broadcast a fifteen-second film clip of the act on its eleven o'clock news program on September 1, with commentary by a newscaster who described the act as a "thriller" and "you really need to see it *in person* \* \* \* to appreciate it \* \* \*."

Plaintiff sued the defendant for invasion of privacy, contending that the defendant had appropriated the plaintiff's professional talents for its own use. The trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed that judgment, the majority holding that the complaint stated a cause of action for both conversion and invasion of common law copyright. Judge Manos concurred in the judgment only, on the theory that the complaint stated a claim for appropriation of the common-law right of publicity.

The cause is before this court pursuant to an allowance of a motion to certify the record.

STERN, J. The complaint in this case claimed that "the defendant showed and commercialized the film of \* \* \* [plaintiff's] act without his consent and such conduct by the defendant was unlawful appropriation of plaintiff's professional property." Appropriation is a well-recognized branch of the more general tort of interference with the right of privacy. In *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N. E. 2d 340, this court affirmed the principle that each individual has a legally protected right of privacy. In paragraph two of the syllabus of that case, the court held that:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

Appropriation is also recognized as a distinct form of invasion of privacy by the proposed Restatement of Torts, and by a leading commentator. Restatement of Torts 2d (Tentative Draft, No. 21 [1975]), Section 652C; Prosser, Privacy, 48 Calif. L. Rev. 383, 401-07.

The majority of the Court of Appeals, however, found that the recognized forms of invasion of privacy, including appropriation, do not "provide a logically adequate embrace for the wrong the plaintiff claims has been done." The court proceeded to find that a performer's act is property entitled to protection under the common law and held that: "The total appropriation of a performer's act by video-taping and re-showing without the performer's permission is an invasion of a property right which will give rise to a cause of action for damages based either on conversion or the invasion of the performer's common law copyright."

It is the opinion of this court that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such. The Court of Appeals raised other issues in this case, *sua sponte*, and has, in our view, improperly and unwarrantedly disregarded the principles underlying conversion and common law copyright. A few comments on those subjects are therefore in order.

Conversion is a wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights. *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497, 32 N. E. 476. Although the original rule at common law was that only tangible chattels could be converted, it is now generally held that intangible rights which are customarily merged in or identified with some document may also be converted. Examples include drafts,<sup>1</sup> bank passbooks,<sup>2</sup> and deeds.<sup>3</sup> See Prosser, *The Law of Torts* (4th ed. 1971), at pages 81-82. See, generally, Annotation, 44 A. L. R. 2d 927. But conversion does not apply to any intangible right, and certainly it has never been held that one's countenance or image is "converted" by being photographed. The difficulties with any such holding are apparent. "Taking" a photograph of someone does not in fact take anything from that person. If the photograph or film is only a conversion when shown to others, we may well ask to how many others it must be shown, and how often, before it becomes actionable. The distinguishing characteristic of conversion is the forced judicial sale of the chattel or right of which the owner has been wrongfully

<sup>1</sup>*Gibsonburg Banking Co. v. Wakeman Banking Co.* (1900), 20 C. C. 591, 10 C. D. 754.

<sup>2</sup>*Stebbins v. North Adams Trust Co.* (1922), 243 Mass. 69, 136 N. E. 880.

<sup>3</sup>*Hayes v. Massachusetts Mut. Life Ins. Co.* (1888), 125 Ill. 626, 18 N. E. 322.



deprived. In the case of such intangible quasi-proprietary rights as are involved here, a forced sale would be largely absurd, because of the doubtfulness of determining what has been "taken." Is it the right to perform the act, to view it, to present it on television, to license its filming, or some other right? Judicial ingenuity could perhaps award damages and find a *res* said to be sold. But to extend the ambit of conversion to rights such as those claimed by plaintiff, which are more appropriately considered under wholly distinct legal principles, is confusing, unnecessary, and improper.

Common law copyright is similar to statutory copyright, in that it recognizes the right of the author or creator of an original literary or artistic work to legal protection of his efforts. It is a right which arises out of the very act of creation. If a work may be copyrighted under the statutes, it will also be protected by common law before it is published or statutorily copyrighted, and the two forms of copyright are closely related, since the common law copyright expires when the protection of statutory copyright is acquired. See 1 Nimmer on Copyright 38-42.1, Section 11.1.

Plaintiff's performance of his act is plainly not a "writing" within any of the statutory classification of works capable of copyright registration. Sections 4, 5, Title 17, U. S. Code. These statutory requirements do not restrict the common law protection for unpublished works, but they do suggest some appropriate limits to the sorts of intellectual property and rights which are properly copyrightable. It has been suggested, for example, that non-tangible oral expression should be protected by the common law, even though these are outside the statute. Cf. *Estate of Hemingway v. Random House* (1968), 23 N. Y. 2d 341, 296 N. Y. S. 2d 711 with 1 Nimmer on Copyright, *supra*.

The essential purpose of copyrights, to foster and protect literary and artistic expression, might well warrant expansion coverage to such communications. But this plaintiff's performance is safely outside even those bounds of copyright. It is not a literary or artistic expression, nor is it a dramatic composition, nor is it original. To extend common law copyright to protect such spectacles as "human cannonballs," and to employ doubtful logic to hold that public performances do not constitute a publication which would terminate the right, would be to grant a perpetual right against copying, presumably both by other performers or by photographers, which would be even greater than the protection accorded by patents or statutory copyrights. Common law copyright should not be so extended. In short, it has no application to this case.

We proceed, then, to the issues we find to be raised in this case: Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and, if so, was the television station privileged to do so?

The concept of a right of privacy was first proposed in a celebrated law review article by Samuel D. Warren and Louis D. Brandeis in 1890. *The Right to Privacy*, 4 Harv. L. Rev. 193. Although initially rejected by the New York courts, the right of privacy was soon accepted by many state courts and enacted by statute in other states, including New York. Many of the early cases concerning the right of privacy involved the commercial use of plaintiff's name, picture and likeness for such business purposes as advertising a product, or adding luster to the name of a corporation, and many of these cases arose under statutes which granted a right of privacy based upon appro-

priation of one's name or face only to exploitation "for advertising purposes or for the purposes of trade." 8 McKinney's Consolidated Laws of New York, Civil Rights, Section 50. See, e.g., *Cardy v. Maxwell* (Sup. Ct. 1957), 9 Misc. 2d 329, 169 N.Y.S.2d 547.

In a jurisdiction where the right of privacy is a matter of common law, the courts have not limited the right solely to commercial appropriation, and have, for example, granted an injunction to prevent a woman from wrongly claiming she was the plaintiff's common law wife. (*Burns v. Stevens* [1926], 236 Mich. 443, 210 N.W. 482); cancelled a birth certificate wrongly naming the plaintiff as father (*Vanderbilt v. Mitchell* [1907], 72 N. J. Eq. 910, 67 A. 97); enjoined the unauthorized use of a prominent politician's name by a political party (*State, ex rel. LaFollette v. Hinkle* [1924], 131 Wash. 86, 229 P. 317); and found actionable the signing of plaintiff's name to a telegram urging the governor to veto a bill (*Hinish v. Meier & Frank Co.* [1941], 166 Ore. 482, 113 P. 2d 438). The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise. The commercial use of a person's identity is likely to be more offensive to its subject, and may serve in some cases to distinguish mere incidental use of a person's name and likeness, which is not actionable, from appropriation of the benefits associated with the person's identity, which is. But the fundamental wrong is the appropriation for one's self of the benefits of another's name, likeness, or identity, and the wrong is the same whether or not that benefit is pecuniary. The applicable principles are well set out in Restatement of Torts 2d (Tentative Draft No. 13, 1967), Section 652C, and the comments

thereto, at pages 108 *et seq.*, portions of which are quoted below.<sup>4</sup>

<sup>4</sup>Section 652C "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

"Comment:

"a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as such use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle such a licensee to maintain an action to protect it. The right of such a third person has sometimes been called a 'right of publicity.'

"b. *How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to such commercial appropriations. It applies also where the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though such use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in New York, Oklahoma, Utah and Virginia have, however, limited the liability to commercial uses of names or likeness.

"\* \* \*

"c. *Appropriation.* In order that there may be liability under the rule stated in this section, the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness. It is not enough that the defendant has adopted for himself a name that is the same as that of the plaintiff, so long as he does not pass himself off as the plaintiff, or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity. Unless there is such an appropriation, the defendant is free to call himself by any name he likes, whether there be only one person or a thousand others of the same name. Until the value of the name has in some way been appropriated, there is no tort. Compare, as to the use of a personal name as an infringement to the rights connected with a trade name, the rule stated in Section 722.

"\* \* \*

(Continued on following page)



The determinative question is, accordingly, not whether the defendant's taking and use of the films of plaintiff's act was commercial, but, rather, whether that taking and use constituted the appropriation of the defendant's exclusive rights to his own likeness and identity.

It seems, of course, somewhat anomalous for the plaintiff, who regularly performs in public before large crowds, to claim a right of privacy. The very purpose of a performer is to lure people to come watch him, and certainly the plaintiff hoped not for privacy, but for crowds of thrilled spectators. But there is no real anomaly; the "privacy" which the performer seeks is personal control over commercial display and exploitation of his personality and the exercise of his talents. In other words, performers and other public figures wish to keep the benefits of their performances private, or at least to retain control over them, in much the same way that any individual would wish to keep control over his name and face. Judge Jerome N. Frank has aptly called this aspect of privacy "the right of publicity":

---

Footnote continued—

"d. *Incidental use of name or likeness.* The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name, or his appearance, is brought before the public, since neither is in any way a private matter, and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make such incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes."

"\* \* \* We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i. e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i. e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

"This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." *Haelan Laboratories, Inc. v. Topps, Chewing Gum, Inc.* (C.A. 2, 1953), 202 F.2d 866, 868. See, also, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* (1938), 24 F. Supp. 490.

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, e. g., *Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.

We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might, over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area.

The decisive issue in this case, then, is whether the defendant TV station had a privilege to film and televise the plaintiff's performance, on its nightly news program, and if so whether that privilege was abused.

In *Time, Inc. v. Hill* (1967), 385 U.S. 374, the action was for invasion of the right of privacy under the New York statute, essentially under the category of placing a person in a false light. In that case, the court held, at pages 387-88, "that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." On its face, this holding might be taken to mean that any truthful report which constitutes an invasion of privacy is privileged. In fact, it is not likely that the court meant to go so far. The principle of the case is that freedom of the press inevitably imposes certain limits upon an individual's right of privacy. As the court stated further:

"\* \* \* Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expressions.' *Bridges v. California*, 314 U.S. 252, 269. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of \* \* \* [freedom of the press].' *Winters v. New York*, 333 U.S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '\* \* \* it must be protected if the freedoms of expression are to have the "breathing space" that they "need \* \* \* to survive" \* \* \*'. *New York Times Co. v. Sullivan*, *supra*, at 271-272. As James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.). \* \* \*

The effect of this holding, and of that in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, is that the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private. See Restatement of Torts 2d (Tentative



Draft No. 13, 1967)<sup>5</sup> Section 652 F. In cases involving claims of false light, that privilege may be lost by publication of knowing falsehoods, or in reckless disregard of the truth. Just as the press was held to be privileged to report matters which would otherwise be private, if they are of public concern, so too, it must be held privileged when an individual seeks to publicly exploit his talents while keeping the benefits private. The same privilege exists in cases where appropriation of a right of publicity is claimed, and the privilege may properly be said to be lost where the actual intent of the publication is not to give publicity to matters of legitimate public concern.

No such claim of abuse was made in this case, nor does it appear any could be made. The 15 second film clip of plaintiff's public performance was broadcast a single time on a regular nightly news program. Under the standard articulated by the court in *Time, Inc. v. Hill, supra*, it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that such a taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point

<sup>5</sup>Tentative Draft No. 21, of the Restatement of Torts, modifies Dean Prosser's formulation of the right of privacy somewhat by formulating the issue to be whether the appropriation is an "unreasonable" invasion of privacy, rather than whether it is privileged. However, since the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one. This approach does not suggest, however, that a claimed appropriation might not be *de minimis*.

of view, that position is, of course, understandable, for a film or video tape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here.

Here, the TV station was privileged to report the facts of Mr. Zacchini's performance in a newscast, because the performance was a matter of legitimate public interest. No abuse appears which would defeat that privilege. The judgment of the Court of Appeal is reversed and the judgment of the Court of Common Pleas is reinstated.

*Judgment reversed.*

O'NEILL, C. J., HERBERT, CORRIGAN, W. BROWN and P. BROWN, JJ., concur.

CELEBREZZE, J., concurs in part and dissents in part.

CELEBREZZE, J., concurring in part and dissenting in part. Although I concur in paragraphs one and two of the syllabus of the majority opinion, for the reasons that follow, I must dissent from paragraph three of the syllabus and from the judgment.

The majority opinion properly rejects the theories of conversion and common law copyright adopted, *sua sponte*, by the Court of Appeals as rationale supporting its decision, and, additionally, properly characterizes the instant cause of action as involving the "right of publicity." In this regard, the majority opinion states:

"It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection \* \* \*."

In applying the above stated principle to the facts of this cause, the majority opinion proclaims that " \* \* \* [w]e may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might, over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area."

Yet, the majority opinion concludes that Scripps-Howard Broadcasting Company may do just that, by holding, as a matter of law, that a privilege obtains in favor of the media when reporting "matters of legitimate public interest" such that the instant cause of action must be defeated.

For two reasons, I strenuously disagree with the result reached by the majority in this case.

First, the majority's reliance upon *Time, Inc. v. Hill* (1967), 385 U.S. 374, and *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, in support of its decision is questionable, at best, and is clearly erroneous, at worst. A significant body of case law has developed subsequent to those decisions that must be recognized in the event the principles elucidated in *New York Times Co. v. Sullivan, supra*, and *Time, Inc. v. Hill, supra*, are applied herein. Examination of the relevant decisions is, therefore, appropriate.

In *New York Times Co. v. Sullivan, supra*, the Supreme Court of the United States held that before a newspaper may be held liable in damages to a "public official" in a defamation action, it must be established that the publication giving rise to the cause of action was made "with actual malice." The court defined "actual malice" as requiring a plaintiff to prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan, supra* (376 U.S., at page 280). In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, the court extended application of the *New York Times* "actual malice" standard to "public figures." In *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, a plurality of the court further extended application of the *New York Times* standard to actions in defamation brought by private persons whenever the statements allegedly defamatory concerned matters of general or public interest.

However, in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, the court repudiated the plurality opinion in *Rosenbloom*, stating, at page 346, that "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge \* \* \* [a] legitimate state interest to a degree that we find unacceptable."



In *Gertz*, the court held, at page 347, that " \* \* \* so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. \* \* \*" (Footnote omitted.)

" \* \* \* We endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For reasons stated below, we hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. \* \* \*" *Id.*, at page 348.

The *Gertz* court also established guidelines to be followed by trial courts in considering whether a particular person is a "public figure." In this regard, the court, at page 345, stated:

" \* \* \* For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Recently, in *Time, Inc. v. Firestone* (1976), ..... U.S. ...., 47 L. Ed. 2d 154, the Supreme Court of the United States reaffirmed its holding in *Gertz v. Robert Welch, Inc.*, *supra*.

Examination of the foregoing cases discloses that the Supreme Court of the United States has determined not to apply the strict test enunciated in *New York Times Co. v. Sullivan*, *supra* (376 U.S. 254), to defamation actions instituted against the media by private individuals.

The law expressed in *Time, Inc. v. Hill*, *supra* (385 U.S. 374), must be viewed in light of *Gertz v. Robert Welch, Inc.*, *supra*, and *Time, Inc. v. Firestone*, *supra*.

In *Time, Inc. v. Hill*, the court applied the *New York Times* standard to a "false-light" invasion of privacy action commenced by a private individual. In the next "false-light" case, however, *Cantrell v. Forest City Pub. Co.* (1974), 419 U.S. 245, the court, although applying the *New York Times* standard because the trial court had, without objection, instructed the jury upon it with the result that a verdict was obtained against the defendant-publisher, intimated that the *New York Times* standard need not constitutionally be applied in false-light cases brought by private individuals, citing *Gertz v. Robert Welch, Inc.*, *supra*.

The implication of the foregoing analysis as applied to the facts of the instant cause is obvious. There is essentially little difference in denominating a cause of action as "false-light invasion of privacy" as opposed to "defamation," because the legal theory utilized to decide both will be the same. In my view, the decision in *Gertz v. Robert Welch, Inc.*, will eventually be held to apply to both types of actions. Accordingly, although neither the false-light nor the defamation appellation can accurately be attached



to the instant cause of action, for the reason that no falsity is alleged by the plaintiff herein, it appears to me that the principles announced in *Gertz v. Robert Welch, Inc.*, *supra*, effectively supersede the rationale upon which *Time, Inc. v. Hill*, *supra*, was based, and, therefore reliance by the majority upon *Time, Inc. v. Hill* is misplaced.

Consistent with the above, in my view the majority opinion herein falls into serious error by applying the stricter standard of *New York Times Co. v. Sullivan*, *supra*, to the facts of this cause. Additionally, the majority opinion conceivably errs by characterizing the standard to be used in the first instance, as "whether the matters reported were of public interest," as that standard was rejected in *Gertz v. Robert Welch, Inc.*, *supra*, at least in instances where the plaintiff is neither a "public official" nor a "public figure."

I have reviewed the foregoing authorities only because of the reliance placed upon *Time, Inc. v. Hill*, *supra*, and *New York Times Co. v. Sullivan*, *supra*, by the majority. Although the issues presented in false-light, invasion of privacy and defamation actions are similar to those presented in the instant "right of publicity" action insofar as First Amendment rights and privileges of newspaper and broadcast media are concerned, the issues presented herein are distinctly different in all other respects, and require separate analysis.

This is a case of first impression in this state. It basically involves a further review of the principles first enunciated in this state in *Housh v. Peth* (1956), 165 Ohio St. 35, wherein the court established that an action may properly be commenced to protect or vindicate a right of privacy.

In the instant cause of action, the plaintiff, Mr. Hugo Zacchini, sought to vindicate the alleged unlawful appropriation of his professional property by the defendant, Scripps-Howard Broadcasting Company.

The facts of this case are simple, and basically uncontradicted. In his complaint, plaintiff alleges "that he is engaged in the entertainment business and that the act which he performs is an act which was invented by his father and has been performed only by his family for the last fifty years." The act to which he refers is colloquially known as the "human cannonball act." In this act, Zacchini is shot out of a cannon into a net approximately 200 feet distant. The entire performance occupies 15 seconds of time.

In August and September, 1972, Zacchini performed his act at the Geauga County Fair, in Burton, Ohio. On or about August 30, 1972, Zacchini requested a free-lance news reporter employed by the defendant not to film his act. However, on September 1, 1972, this reporter did film Zacchini's entire act upon the express order of his superior, the producer of defendant's Eyewitness News Program. The entire act as filmed was broadcast that night on defendant's 11:00 P.M. news program.

Two fundamental questions are presented herein: (1) Whether the above rendition of facts is sufficient to state a cause of action; and (2) if so, whether summary judgment was appropriately granted to the defendant.

The majority opinion concludes that plaintiff stated a cause of action. I agree.

As the majority opinion accurately indicates, plaintiff's cause of action in this case rests upon a claimed infringement of his "right of publicity." This right springs,

as illustrated in the majority opinion, from the first form of invasion of privacy described by Dean Prosser in his *Handbook of the Law of Torts* (4 Ed.), at page 804, as appropriation of the plaintiff's name or likeness. However, this "right of publicity" differs from the other three forms of invasion of privacy characterized by Dean Prosser in that it, unlike the others, generally involves a pecuniary loss, an interference with property. That is because, as in the instant cause, the identity appropriated has an actual or potential commercial value. See, generally, Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U. L. Rev. 553 (1960).

It is now largely beyond dispute that an individual, such as Zacchini, involved in the entertainment or competitive athletic business, has a valuable property right in his or her name, photograph, image and performance, and that this right may be sold. See, e. g., *Motschenbacher v. R. J. Reynolds Tobacco Co.* (C.A. 9, 1974), 498 F.2d 821; *Cepeda v. Swift & Co.* (C.A. 8, 1969), 415 F.2d 1205; *Price v. Hal Roach Studios, Inc.* (S.D. N.Y. 1975), 400 F. Supp. 236; *Uhlaender v. Henricksen* (D. Minn. 1970), 316 F. Supp. 1277; *Sharman v. C. Schmidt & Sons, Inc.* (E.D. Pa. 1963), 216 F. Supp. 401. See, also, *Ettore v. Philco Television Broadcasting Corp.* (C.A. 3, 1956), 229 F.2d 481; *Haelan Laboratories v. Topps Chewing Gum* (C.A. 2, 1953), 202 F.2d 866, certiorari denied, 346 U.S. 816; *Grant v. Esquire, Inc.* (S.D. N.Y. 1973), 367 F. Supp. 876; *Canessa v. J. I. Kislak, Inc.* (1967), 97 N. J. Super. 327, 235 A.2d 62; *Hogan v. A. S. Barnes & Co.* (C.P. Pa. 1957), 114 U.S.P.Q. 314. The fundamental concept involved in the "right of publicity" cause of action is the theory that "a person has the right to enjoy the fruits of his own industry free from unjustified interference." *Uhlaender v. Henricksen*, *supra* (316 F. Supp., at page 1282). (Citations omitted.)

Although the majority opinion recognizes the existence of this "right of publicity," it concludes that summary judgment was appropriately granted under the facts of this cause. I disagree.

Civ. R. 56 (C) provides, in pertinent part:

"\* \* \* Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

Civ. R. 56 (C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

As stated recently in *Houk v. Ross* (1973), 34 Ohio St. 2d 77, 81: "Civ. R. 56 is virtually identical to the federal rule, FRCP 56, after which it was patterned." The gen-



eral view of the various federal courts supports the construction of Civ. R. 56(C) rendered herein. See *Ecology Center of Louisiana, Inc. v. Coleman* (C.A. 5, 1975), 515 F.2d 860; *Tee-Pak, Inc. v. St. Regis Paper Co.* (C.A. 6, 1974), 491 F.2d 1193; *Caplan v. Roberts* (C.A. 9, 1974), 506 F.2d 1039; *Bloomgarden v. Coyer* (C.A. D.C. 1973), 479 F.2d 201. See, generally, 6 Moore's Federal Practice 56-463 (2 Ed.), Paragraph 56.15(3). See also, *Joseph v. Portsmouth* (1975), 44 Ohio St. 2d 155.

In my view, summary judgment was inappropriately granted by the Court of Common Pleas herein both because there exist genuine issues of material fact and because the defendant is not entitled to judgment as a matter of law.

The following issues of material fact, while not exhaustive, are illustrative of questions not yet resolved in the instant cause:

1. To the extent that *Gertz v. Robert Welch, Inc.*, *supra* (418 U.S. 323), is here relevant, whether the plaintiff is a "public figure" as defined in *Gertz*?
2. Whether the plaintiff had contracted to a third party, for remuneration, the exclusive right to exhibit his performance?
3. Whether the plaintiff's contract of employment with the proprietor of the county fair included receipt of a percentage of the paid admissions?
4. Whether the broadcast of his entire act by the defendant, in total disregard of the plaintiff's express request to the contrary, constituted an invasion of the plaintiff's "right of publicity" as established by the majority opinion?

5. Whether the defendant's broadcast of plaintiff's entire performance was influenced by its commercial interests (i.e., ratings)?

In conclusion, since the plaintiff has stated a valid cause of action, since genuine issues of material facts remain unresolved, and since the majority opinion misapplies the relevant law and, therefore, in paragraph three of the syllabus, incorrectly develops the appropriate standard by which the present appeal should be measured, I must respectfully dissent from paragraph three of the syllabus, and from the judgment rendered herein.

I would affirm the judgment of the Court of Appeals, albeit for different reasons, and remand the cause to the Court of Common Pleas for trial. The effect of such a disposition would not impermissibly expose this defendant to unjustifiable litigation. It would only afford this plaintiff his day in court. Assuming, *arguendo*, that the plaintiff could discharge his burden of proving that the defendant's action economically damaged him, at that time, and in the normal course of law, the defendant could present its defense of the charge. By following this accepted procedure, the Court of Common Pleas, in the first instance, could develop the appropriate legal standard by which the unique circumstances of this cause should be tested.

In my view, a majority of this court has chosen to address and decide the novel and delicate issues of fact and law herein presented upon a woefully inadequate record. It has often been said that "good facts make bad law." However, in this case, a more appropriate cliché is "no facts make no law."



**JOURNAL ENTRY OF THE COURT OF APPEALS**

(Dated July 10, 1975)

No. 33713

COURT OF APPEALS OF OHIO  
EIGHTH DISTRICT, COUNTY OF CUYAHOGAHUGO ZACCHINI,  
*Plaintiff-Appellant,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Defendant-Appellee.*

APPEAL FROM COMMON PLEAS COURT

**JOURNAL ENTRY**

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

See Opinion Incorporated in This Journal Entry by Reference. See Also MANOS, J., Concurring Opinion.

No other error appearing in the record, this cause is reversed and remanded to the Common Pleas Court for further proceedings in accordance with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JACK G. DAY  
*Presiding Judge*

DAY, P.J., MANOS, J., Concur in Judgment Only

(See Concurring Opinion)

PARRINO, J., Concur

**OPINION OF THE COURT OF APPEALS**

(Dated July 10, 1975)

No. 33713

IN THE COURT OF APPEALS OF OHIO  
CUYAHOGA COUNTY, EIGHTH DISTRICTHUGO ZACCHINI,  
*Plaintiff-Appellant,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Defendant-Appellee.***OPINION****SYLLABUS**

1. The protections of the First and Fourteenth Amendments to the United States Constitution extend only to state action assuming the provisions of those amend-

ments are otherwise applicable. When a private party resorts to the state courts to enforce a claimed right, action by the state court is state action for the purposes of the First and Fourteenth Amendments.

2. The protection of the First and Fourteenth Amendments to the Constitution of the United States extends to an announcement and/or a critical review of a dramatic or other entertainment event. However, those Amendments do not shield an appropriation of the property of another.

3. A performer's "act" is the product of his talent. As such it is property entitled to the same protection under the common law as any other property right.

4. The total appropriation of a performer's act by video-taping and re-showing without the performer's permission is an invasion of a property right which will give rise to a cause of action for damages based either on conversion or the invasion of the performer's common law copyright.

5. The protection of common law copyright in a performance continues unless and until lost by general publication or surrender by the owner. The right is not lost by publication before an audience under circumstances indicating no intent to dedicate the performance to the public generally.

6. The test of public dedication is partly the intent of the owner and partly the objective character of the dissemination.

7. A party claiming that a common law copyright has been lost by public dedication has the burden of proving such dedication.

DAY, J.:

Plaintiff-appellant, Hugo Zacchini (plaintiff), is a performer with a singular act. He is shot out of a cannon. The whole performance lasts about fifteen seconds.

In the summer of 1972, he took his act to the Geauga County Fair at Burton, Ohio, where he was billed as the "human cannon ball". On August 30, 1972, while engaged at the fair he saw a photographer for defendant-appellant, Scripps-Howard Broadcasting Company (defendant), carrying a camera. He approached the photographer and requested that he not photograph the act. The following day, on express orders of the defendant, the photographer did photograph plaintiff's act. The film depicting plaintiff's entire performance was shown on defendant's evening news program, but with favorable comment on its merits. The affidavit of the photographer filed in support of motion for summary judgment recites that he was admitted to the fair without paying admission and that "news reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair". The implication is that the general public paid a fee at least to gain entrance to the fairgrounds.

Plaintiff sued defendant for invasion of privacy. Defendant moved for summary judgment which the trial court granted. Plaintiff appealed without specifying assignments of error. However, two assignments can be adduced from the argument headings in his brief:

"(1) THE DEFENDANT HAS APPROPRIATED THE PLAINTIFF'S PROFESSIONAL TALENTS FOR THEIR [sic] OWN USE.

"(2) APPELLEE'S [DEFENDANT'S] CONDUCT IS NOT PROTECTED BY THE FIRST AMENDMENT." (Bracketed material supplied.)

For reasons which are assessed below, we reverse.

I.

An eminent torts scholar<sup>1</sup> divides invasions of privacy into four parts under the rubric right to privacy. These are appropriation,<sup>2</sup> intrusion<sup>3</sup>, public disclosure of private facts,<sup>4</sup> and false light in the public eye.<sup>5</sup> While the plaintiff in the present case has premised his claim on the right of privacy, we think none of Professor Prosser's categories provide a logically adequate embrace for the wrong the plaintiff claims has been done.

While it is true that a professional golfer, specializing in trick shots, did recover for an invasion of privacy when a motion picture company reproduced an exhibition he had

<sup>1</sup>Prosser, Wm. L., *Handbook of the Law of Torts*, West Publishing Co., 1971, pp. 804, et seq.

<sup>2</sup>"... appropriation for defendant's benefit or advantages, of the plaintiff's name or likeness", *id.* p. 804.

<sup>3</sup>"... intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag in a store." Professor Prosser points out that this branch of the right may reach wire tapping intrusions, microphones and "peering into windows of a home as well as persistent and unwanted telephone calls", *id.* pp. 807-808.

<sup>4</sup>"... a cause of action [founded] in publicity of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation", *id.* p. 809. Limits on this theory of action are (1) the disclosure must be a public not a private one; (2) the facts must be private and not public; and (3) the matter made public "must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities". *id.* pp. 810-811.

<sup>5</sup>"... publicity which places the plaintiff in a false light in the public eye", *id.* p. 812.

done for Fox Movietone News,<sup>6</sup> the action was based on the New York privacy statute.

That statute specifically provided that:

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without . . . written consent first obtained . . . may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained by reason of such use . . ."

However, discussion in the opinion in *Paulsen v. Personality Posters, Inc.*,<sup>8</sup> demonstrates the difficulty in classifying actions such as the present one as actions for the invasion of privacy. The court made the obvious point:

"... it is clear that while plaintiff is ostensibly seeking redress for an alleged 'violation of his privacy', it is not his privacy at all that concerns him. Privacy in its usual sense is hardly the goal of an entertainer or performer. What such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture. While such concept, which is termed the 'right of publicity', has been accorded some

<sup>6</sup>*Redmond v. Columbia Pictures Corporation* (Ct. of App. N.Y., 1938), 277 N.Y. 707.

<sup>7</sup>New York Civil Rights Law, Section 51 (McKinney, 1948).

<sup>8</sup>(Sup. Ct., N.Y. Cty., 1968), 299 N.Y.S. 2d 501. Pat Paulsen, a "put on" candidate for President of the United States unsuccessfully sought a preliminary injunction to prevent distribution of a poster bearing his picture. The court thought he faced no irreparable injury but did not foreclose his right to recover for financial loss on one or the other of the two theories upon which he based his action, *id.* 510. These were (1) violation of plaintiff's right to privacy in violation of Section 51 of the New York privacy statute, and (2) violation of plaintiff's common law copyright, *id.* 505, 510.



limited recognition (see *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866), the courts of this state have evidenced no inclination to adopt or follow such construction within the context of Section 51. On the contrary, it has been made clear that the purpose of the statute is to redress injury for invasions of a 'person's right to be let alone', with recovery being grounded on the mental strain, distress, humiliation and disturbance of the peace of mind suffered by such person, hardly what plaintiff here seeks, and that the statute was *not* enacted to fill gaps in the copyright law or to afford substitute relief for breaches of contract or violations of various other species of property rights." (Long italics added.) *Id.* 508.

The *Paulsen* case and, perhaps even more emphatically, the case of *Gautier v. Pro-Football, Inc.*,<sup>9</sup> illustrate the difficulties in protecting a performance against virtual confiscation even under a statute protecting the right to privacy. There is no privacy statute in Ohio and whether the common law of Ohio would give benediction to a cause of action for violation of plaintiff's privacy or not, it is a theory inappropriate to his claim. For that claim does not involve his privacy in any usual sense of the word.<sup>10</sup>

<sup>9</sup>Cf. *Gautier v. Pro-Football, Inc.* (1952), 304 N.Y. 354, 107 N.E. 2d 485, where recovery under Section 51 was denied an animal trainer whose act was telecast between halves of a professional football game without the consent of the American Guild of Variety Artists as provided in his contract with Pro-Football, Inc., and despite his formal objection, 304 N.Y. at 357, 107 N.E. 2d at 487.

<sup>10</sup>A theory of unfair competition upon which equitable relief might be posited, see *Waring v. WDAS Broadcasting Station* (1937), 327 Pa. 433, 449-456, seems equally inappropriate in the factual setting of the present case. Compare the concurring opinion in *Waring* at p. 464.

## II.

The performance which constitutes an "act" is the product of the actor's talent and is his property.<sup>11</sup> And, if his act is appropriately considered a dramatic or creative production, it involves a property right entitled to the same protection under the common law as any other property right, *Waring v. WDAS Broadcasting Station*, *id.* pp. 440-442; cf. *Caliga v. Inter-Ocean Newspaper Co.* (7 Cir., 1907), 157 F. 186, 188 (aff. 1909, 215 U.S. 182, 54 L. Ed. 150, on grounds unrelated to property right).

It happens the plaintiff's total performance consumed only fifteen seconds. This is what defendant captured on tape and televised. Such a taking is no different generically from taping and broadcasting the total performance by a violin virtuoso, a full performance by a leading opera company or a complete program by the first tenor of the world. Plaintiff's act is clearly the dramatic product of his talent and, therefore, a property right. Moreover the prospect of a total performance being captured on audio-visual tape without permission and then repeated on television without legal redress puts the consequences of such an appropriation of property in a rather appalling perspective.

Of course, total appropriation is distinguishable from mere announcements of dramatic and entertaining events

<sup>11</sup>"... a celebrity has a legitimate proprietary interest in his public personality. . . . That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property." *Uhlaender v. Henricksen* (D.C. Minn., 1970), 316 F. Supp. 1277, 1282. Products of intellectual labor "not dedicated by publication to common use, are at common law property, and to be protected as such". *Thompson v. Famous Players-Lasky Corp.* (D.C. Ga., 1925), 3 F.2d 707. "A performer has a property right in his performance that it shall not be used for a purpose not intended. . . ." *Giesecking v. Urania* (S. Ct. N.Y. Cty., 1956), 155 N.Y.S. 2d 171, 172.

beforehand or critical reviews afterward. There is little quarrel with the proposition that the announcement or the review is newsworthy and protected by the First Amendment. It seems equally clear that the full performance is artistic property which cannot be taken from the artist or performer without giving rise to a cause of action. If the appropriating action needs a title in tort, conversion will do.

"... in order to constitute a conversion, it was not necessary that there should have been an actual appropriation of the property by the defendant to its own use and benefit; it might arise from the exercise of a dominion over it in exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights. If one takes the property of another, for a temporary purpose only, in disregard of the owner's right, it is a conversion. Either a wrongful taking, an assumption of ownership, an illegal use or misuse, or a wrongful detention of chattels, will constitute a conversion. . . ." *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497-498. See also *Fulks v. Fulks* (1953), 95 Ohio App. 515, 518-519.

Although a dramatic performance is considerably different from the usual object of conversion, see 50 ALR 1167, et seq., nonetheless, it is common for the existing law to reach new subjects by analogy. And it imposes small strain, if any, on the concept of conversion to reach the wrong done the plaintiff in this case but for the rule the intangibles cannot be converted. The stress on that score stems from the notion, apparently rooted in ancient history, that only tangibles can be the objects of a conversion. However, Professor Prosser has pointed out that the concept of what can be converted has been expanded to include symbols of rights such as a promissory note, a check, or a stock certificate and nothing but the lack of demonstrated neces-

sity to expand the remedy seems to explain the lack of further enlargement.<sup>12</sup> In our view this case and instances like it demonstrate the necessity for expansion.

We hold that an intangible such as the performance of the plaintiff in this case is properly subject to protection from illegal conversion.

### III.

Common law copyright is a designation for a concept protecting property rights in intellectual productions conferred by the common law. It is sometimes called "copyright before publication", *Palmer v. DeWitt* (1872), 47 N.Y. 532, 537, as distinguished from statutory copyright, i.e., "copyright after publication". Such rights as the common law conferred are not lost on limited publication, *Kurfiss v. Cowherd* (Mo. App., 1938), 121 S.W. 2d 282, 287; *F. W. Dodge Corp. v. Comstock* (S. Ct. N.Y., 1931), 251 N.Y.S. 172, 177. The right continues unless lost by general publication by the owner. It is absolute and exclusive in him while he retains it, *Jenkins v. News Syndicate Co.* (S. Ct. N.Y., 1926), 219 N.Y.S. 196, 198; *Banker v. Caldwell* (1859), 3 Minn. 46, 56; *Berry v. Hoffman* (1937), 125 Pa. Super. 261, 267-268. While general, unqualified publication or abandonment, *Boucicault v. Wood* (C.C.N.D. Ill., 1867), 3 F. Cas. 988, 992, 993, puts the publication in the public domain, the owner may set terms on the use without loss of the right beyond that necessary to the authorized use,

<sup>12</sup>Prosser, *id.*, pp. 81-83. See *Vaughn v. Wright* (1913), 139 Ga. 736, 737 (cited by Prosser):

"Were the tax receipts for which the action was brought such things of value as could be recovered in trover? Trover may be maintained for the wrongful conversion of any species of personal property which is the subject of private ownership, where the person instituting the suit is the owner of such property and entitled to the possession thereof."



*F. W. Dodge Corp. v. Comstock*, id., 176-177, *Palmer v. DeWitt*, id. at 543. The burden of proof is on the party claiming that "what once was the complainant's has now become common property, but exposure for payment of a fee indicates no dedication . . . to the public generally", *New Jersey State Dental Society v. Dentacura Co.* (1898), 57 N.J. Eq. 593, 596, aff. for reasons given in the court below (Ct. of Errors and Appeals, 1899). 58 N.J. Eq. 582. The test of public dedication is partly the intent of the owner and partly the objective character of the dissemination, cf. *Waring v. WDAS Broadcasting Station, Inc.*, supra, 444.

Dramatic scripts can be protected literary property, *Uproar Co. v. National Broadcasting Co.* (D.C. Mass., 1934), 8 F. Supp. 358, 361, modified on other grounds (1st Cir., 1936), 81 F. 2d 373, cert. den. (1936), 298 U.S. 670, 80 L. Ed. 1393; the same can be said for a musical performance; *Waring v. WDAS Broadcasting Station*, id., 440-442, and a public performance is not a dedication which dissolves the protection, *Uproar Co. v. National Broadcasting Co.*, id. at 362; there is a distinction "between performance and publication", *Waring v. WDAS Broadcasting Station*, id. at 443-444. The reason for continuing protection after the performance is the character of presentation. Because it is performed for amusement there is an obvious, indicated intent to confine the use to the limited purpose of entertainment. To allow a spectator to appropriate the presentation for reproduction would destroy other rights of the performer, cf. *Werckmeister v. American Lithographic Co.* (Cir. 2, 1904), 134 F. 321, 325, 69 CCA 553, 68 LRA rev. 244, 117 F. 360, approved, *American Tobacco Co. v. Werckmeister* (1907), 207 U.S. 284, 299, 52 L. Ed. 208, 217, with this prefatory language:

" . . . the property of the author or painter in his intellectual creation is absolute until he voluntarily parts

with the same. One or many persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired."

By clear analogy the performance with which this case is concerned falls within the category of dramatic production. Nor is there any basis for a distinguishing difference merely because the action in the present case is short, does not involve a writing,<sup>13</sup> or may not be entirely original.<sup>14</sup>

Plaintiff contends that the performance was a public performance for the limited purpose of amusement which indicated an intent to confine its dedication.<sup>15</sup> If so, it was entitled to the continuing protection of common law copyright. Ultimately, however, the issue of whether that dedication was limited or general is one which must be resolved at further proceedings in the trial court.

#### IV.

The record does not indicate whether the news program carrying plaintiff's act was commercially sponsored. Some cases distinguish between viable claims and those which are not by finding that only those appropriations are actionable which are coupled with a commercial exploitation, i.e., *Gautier v. Pro-Football, Inc.*, id. 304 N.Y. at 358, 107 N.E. 2d at pp. 487-488, *Redmond v. Columbia Pictures*

<sup>13</sup>However, ownership of the right to produce an opera did not give the owner a literary property in dramatic gestures which have been held unprotected unless protected in the actors themselves, if at all. See *Savage v. Hoffman* (C.C.S.D. N.Y., 1908), 159 F. 584, 585.

<sup>14</sup>*Aronson v. Baker* (1888), 43 N.J. Eq. 365, 370-371, 12 A. 177, 180.

<sup>15</sup>The photographer was admitted free for promotional purposes only. See the quotation from the photographer's affidavit, page 1 of this opinion.



Corp. (Ct. of App., 1938), 277 N.Y. 707, 707-708, 14 N.E. 2d 636, 636-637. However, these cases were applying the New York privacy statute and turned upon the rights afforded by that statute as well as limitations upon recovery imposed by it. No such legislative enactment is involved in the present case. Nor do we decide this case on the right of privacy. The result here is simply a consequence of one or both of two theories of liability. One is the logical extension of the tort of conversion to cover an invasion of property rights superficially different but fundamentally the same as the unlawful converting of tangible property to one's own use.<sup>16</sup> The other theory of recovery is based upon the doctrine of common law copyright. Neither requires commercial exploitation as a necessary element in a valid cause of action.

When the tort of conversion is proven, the plaintiff is entitled to fair compensation for the illegal deprivation of his property:

"... a person whose property is wrongfully taken or withheld from him, many waive his right to the property in specie, and elect to pursue a remedy for damages only; and in such case, the general rule for the measure of damages is the value of the property at the time it was taken, or converted by the wrong-doer. The principle upon which this rule of damages is based is, that justice requires that the injured party should be made whole; but justice to him requires nothing more." *Lake Shore & M. S. Ry. Co. v. Hutchins* (1881), 37 Ohio St. 282, 294.

<sup>16</sup>It has been said that conversion of an intangible is impossible, *Brod v. C. T. Recorder Co.* (1947), 82 Ohio App. 26, 29, although symbolic property, such as a stock certificate, ordinarily called an "intangible", has been held the subject of conversion. The latter is clearly the underlying assumption in *The Cincinnati Finance Co. v. Booth* (1924), 111 Ohio St. 361, 365-366. We are persuaded the distinction between tangible and intangible makes no difference in the circumstances of the instant case, cf. ALR 1173.

Obviously, the converted property is not available on the facts in the present case. Because of the nature of the property it cannot be returned. Thus, an award of damages is proper if damages are proved.

When the recovery theory is common law copyright, damages are an appropriate remedy although frequently coupled with equitable relief, *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.* (Sup. Ct., N.Y. County, 1964), 42 Misc. 2d 723, on reargument at page 727, 248 N.Y.S. 2d 809, 813; *Redmond v. Columbia Pictures Corp.*, *id.*; *Kurkiss v. Cowherd*, *id.*, 283, 286; cf. *Krahmer v. Luig* (Super. Ct., N.J. Ch. Div., 1974), 127 N.J. Super. 270, 273-274, 276, 317 A. 2d 96, 97, 99.

## V.

There can be no argument against the proposition that First Amendment freedoms are:

"... delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button* (1963), 371 U.S. 415, 433, 9 L. Ed. 2d 405, 418.

However, the First Amendment is not properly an issue here. There is no suggestion of a limitation on the defendant's right to comment. This case is not controlled by the reasons for reversing the plaintiff's verdict in *Time, Inc. v. Hill* (1967), 385 U.S. 374, 17 L. Ed. 2d 456. For that case involved a right to privacy to "redress false reports of matters of public interest" under the New York statute. It was reversed because it was submitted to the jury on instructions inadequately covering the defendant's knowledge of the falsity or its reckless disregard of the truth, 385 U.S. at 387-388, 394, 17 L. Ed. 2d at 467, 470. Nor is *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, germane. Of the several important holdings of that case the most important established that a public official

could not successfully maintain a libel suit against critics of his official conduct absent a showing that the criticism was published with knowledge of its falsity or with "reckless disregard of whether it was false or not", 376 U.S. at 279-280, 11 L. Ed. 2d at 706. More to the point for the present case, the First Amendment provides no defense to the taking of private property against the owner's explicit denial of permission.<sup>17</sup> The situation would not be altered even in the absence of an explicit refusal. For an owner need not deny permission to one who takes his property in order to ripen his right to a cause of action for ensuing damage.

The mere fact that the taking and conversion and copyright violations were done by a news medium does not quicken First Amendment rights. The entertainer's performance is his property. The constitutional protection for free dissemination of ideas is neither threatened nor diminished by protecting the owner of property from its seizure under the guise of free expression.

Moreover, a whole public performance is dramatic property, not news, cf. *Jenkins v. News Syndicate Co.*, *supra*, 198, and not an announcement nor critical review. Thus, entertainment, in the sense of a total performance, does not fall within any reasonable definition of newsworthiness warranting the use of the First Amendment to allow its *total* appropriation by a news medium.

Reversed and remanded for further proceedings in accordance with this opinion.

<sup>17</sup>First Amendment rights have been incorporated into the Fourteenth Amendment by judicial decision which renders them limitations against state action. The plaintiff's use of the state courts to enforce his rights against the defendant involves state action sufficient to vitalize First Amendment rights. *Shelley v. Kraemer* (1948), 334 U.S. 1; *Barrows v. Jackson* (1953), 346 U.S. 249, reh. den. 346 U.S. 841. Thus, the defendant is in a position to raise the First Amendment issue if otherwise applicable. It is not.

PARRINO, J. Concurr; MANOS, J., Concurr in Judgment Only (See Concurring Opinion)

MANOS, J., Concurring in the Judgment Only:

I concur only in the judgment of the majority. Hugo Zacchini's complaint stated a claim and his case must be remanded to the Common Pleas Court for trial on the merits. However, I disagree with the majority's assertions that Mr. Zacchini's claim is predicated on conversion or common law copyright. The plaintiff appellant's claim is predicated on the defendant's appropriation of Mr. Zacchini's common law right of publicity. This case should be remanded for trial on this issue only.

In my judgment the plaintiff has a claim against the defendant for the appropriation of his common law right of publicity. The characteristics of this right were first recognized in *Haelan Laboratories Inc. v. Topps Chewing Gum* (2 Cir. 1953), 202 F. 2d 866, when Judge Jerome Frank wrote,

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i. e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' *i. e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

"This right might be called a 'right of publicity'. For it is common knowledge that many prominent persons (especially actors, and ball players), far from



having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This *right of publicity* would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." *Haelan* at 868 (emphasis added)

Several courts since *Haelan* have recognized that a prominent personality has an intangible right of publicity. *Cepeda v. Swift*, 291 F. Supp. 242, 245 (Mo. D.C. 1968), aff'd 415 F. 2d 1205, 1206 (8th Cir. 1969); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F. 2d 821, 826 note 15 (9th Cir. 1974); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281 (Minn. D.C. 1970); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504-505 (Ga. App. 1966); *Sharman v. C. Schmidt and Sons Inc.*, 216 F. Supp. 401, 407 (Pa. E.D. 1963); *Hogan v. A. S. Barnes and Co.*, 114 U.S.P.Q. 314, 320 (Pa. C.P. 1957); *Canessa v. Kislak*, 235 A.2d 62, 71 (N.J. Superior Ct. 1967).<sup>1</sup>

The right of publicity originated from the judicial recognition that a celebrity has a valuable proprietary interest in the exploitation of the publicity value of his name and physical likeness. This intangible proprietary interest could not be protected by the traditional doctrine of the right to privacy.<sup>2</sup> The right of publicity cases recognized an exclusive right in the individual celebrity plaintiff to

<sup>1</sup>See *Manger v. Kree Institute of Electrolysis*, 233 F. 2d 5, 9 footnote 5 (2nd Cir. 1956), as discussed in Gordon, "Right of Property in Name, Likeness, Personality and History," 55 NW. U.L. REV. 553, 571 (1960). See also, *Ettiore v. Philco Television Broadcasting Co.*, 229 F. 2d 481 (3rd Cir. 1956) (discussed in Gordon id.)

<sup>2</sup>Gordon, id. 569, 605-613.

a species of trade name in the name which gained him fame, and a kind of trademark in his own likeness. Once protected by the law this intangible proprietary interest becomes a right of value upon which a plaintiff may capitalize by selling licenses.<sup>3</sup> Such a proprietary right obviously attains its maximum value when the prominent performer is depicted in the capacity or role for which he is famous.<sup>4</sup>

In *Hogan*, *supra*, the defendant published a book for commercial gain. The book was entitled *Golf with the Masters*. It contained several photographs of the famous golfer Ben Hogan in the act of putting. The photographs were used in the book in spite of the plaintiff's express dissent. The court awarded the plaintiff compensatory damages for the appropriation of his right of publicity. The damages were measured by the objective value of the use of Hogan's portrait depicting him playing golf.<sup>5</sup> Likewise, all of the cases that have recognized a celebrity's right of publicity involved a prominent person's recovery of damages inflicted by the defendant's appropriation of the plaintiff's portrait for commercial gain without com-

<sup>3</sup>Prosser, Op. Cit. 807. Note, "The Right of Publicity: A Doctrinal Innovation," 62 YALE LAW JOURNAL 1123 (1953). Note, 41 GEORGETOWN LAW REV. 583 (1953).

<sup>4</sup>Nimmer, "The Right of Publicity," 19 LAW AND CONTEMPORARY PROBLEMS 202, 205-206, 215-217 (1954)

<sup>5</sup>It should be noted that the *Hogan* court integrated the concept of the right of publicity into the Pennsylvania doctrine of Unfair Competition. *Hogan*, 114 U.S.P.Q. 314, 316-320. As the *Hogan* Court observed, Pennsylvania has a broad notion of Unfair Competition because that state rejected the "palming off" theory of Unfair Competition in *Waring v. WDAS Broadcasting* (1937), 327 Pa. 433, cited in *Hogan*, *supra* at 316. However, Ohio's concept of Unfair Competition is more restrictive since Ohio retains the "palming off" doctrine. *Brill v. Singer Manufacturing Co.* (1884), 41 Ohio St. 127, 138-139. Consequently I would decide Mr. Zaccchini's case solely on his right of publicity without reference to Ohio's concept of Unfair Competition.



pensating the plaintiff and without obtaining a release from the plaintiff. In these cases damages were measured by the pecuniary value of the celebrity's portrait as an ingredient in the defendant's commercial endeavor.

Mr. Zacchini's case presents the issue of the appropriation of a public performer's right of publicity in a peculiar context. In this case the plaintiff's publicity value arises from his status as a human cannonball. The defendant appropriated the plaintiff's portrait by filming and broadcasting a video tape of the plaintiff's complete flight out of a cannon. These two acts by the defendant constituted an appropriation of the plaintiff's likeness in the very capacity which Mr. Zacchini has labored to make his likeness famous and valuable. As in the *Hogan* case, the defendant ignored plaintiff's objection to the use of the photographs. This case is unique only because the Scripps-Howard Broadcasting Company did not utilize the appropriated portrait of the plaintiff as an ingredient in a commercial endeavor. In this case the defendant broadcast the plaintiff's likeness for the amusement of the news program's audience. Nevertheless, the massive media exposure inflicted by the defendant may seriously damage the plaintiff's own capacity to capitalize on the value of his likeness by selling future licenses to observe or photograph his flight out of a cannon. This type of injury, which diminishes the pecuniary value of a prominent performer's right to sell future licenses to view or photograph his likeness, is as worrisome an injury to a celebrity's right of publicity as the unjust profit which others may obtain by incorporating the likeness of a famous person into a commercial product without compensating the celebrity. Mr. Zacchini may well be able to prove that, as a result of the defendant's non-consensual broadcast of his likeness, there is less public interest in viewing him shot

out of a cannon.<sup>6</sup> This diminution of the publicity value of the plaintiff's portrait may be reflected by reduced demand on the part of County Fairs for his services, or reduced requests for licenses to photograph him by those who would otherwise seek to incorporate the publicity value of his likeness into their commercial products or advertising campaigns.

There are two proper limitations on liability for the type of appropriation of a public performer's right of publicity that occurred in this case. The first limitation is that the defendant, or its agents, must know that the performer objects to the photographing of his person. If Mr. Zacchini had performed under circumstances sufficient to justify the photographer in believing that Zacchini did not object to the filming, then that reasonable reliance on the part of the photographer would be sufficient to estop Zacchini from asserting his claim for appropriation of his right of publicity. Likewise, if Zacchini had orally consented to the filming, or had signed a release, his claim for the appropriation of his right of publicity would be barred. But in the facts of this case, the defendant had actual knowledge of the plaintiff's affirmative objection to the filming of the plaintiff's likeness. Consequently Mr. Zacchini retains his cause of action.

The second proper limitation on press liability for the type of appropriation that occurred in this case is the protection accorded the media by the First Amendment of

---

<sup>6</sup>Of course it is up to the plaintiff to prove this damage. I realize that it is possible that Mr. Zacchini's publicity value may well have been augmented as a result of the exposure furnished him by the defendant. However, in view of the plaintiff's express request that the media not film his performance, he must feel that such exposure is more detrimental than beneficial to the publicity value of his likeness. Since it is possible that the plaintiff is correct, he should be afforded the opportunity to prove the extent of the injury, if any.

the United States Constitution. Reconciliation of the First Amendment with the right of publicity is a difficult task for this court since the United States Supreme Court has never attempted to reconcile the conflict between First Amendment protections and an individual's interests in his name and likeness.<sup>7</sup> However, I must concur with the majority's analysis of this point. The press in Mr. Zacchini's case appropriated a proprietary interest which the law accords pecuniary worth. That interest is the plaintiff's intangible right to capitalize on the publicity value of his portrait. While I do not believe that such an intangible proprietary interest is properly subject to either conversion or common law copyright, it is nevertheless a valuable property interest which is the engine of Mr. Zacchini's capacity to earn a living. By appropriating that proprietary interest, in spite of Mr. Zacchini's express objections, the defendant may have substantially reduced the publicity value of the plaintiff's likeness and consequently diminished the plaintiff's capacity to sell licenses for the use of his portrait. Such an appropriation exceeds fair comment. Furthermore, Mr. Zacchini's performance constituted neither pressing public business, nor

---

<sup>7</sup>The United States Supreme Court recently spoke in regard to the appropriate balance between some categories of the right of privacy and the First Amendment press protection. However, neither of the two recent cases dealt with the species of privacy pertaining to press appropriation of a plaintiff's name and likeness. See *Cantrell v. Forest City Publishing Co.* 95 S. Ct. 465, 468-469, (1974) (a "false light in the public eye" privacy case); *Cox Broadcasting Corporation v. Cohn*, 95 S. Ct. 1029, 1043-1046 (1975) (a "public disclosure of private facts" privacy case wherein the press published the name of a rape victim in violation of a state statute, after the victim's name appeared on a public record). The Supreme Court has not spoken on the proper balance between First Amendment protections and the privacy issue regarding appropriations of an individual's name and portrait. Since the Supreme Court has not even begun to reconcile the appropriation problem with the First Amendment in the privacy context, it is difficult for this court to reconcile the appropriation problem with the First Amendment in the context of a right of publicity case.

a critical public event about which the public had a particularly compelling need to know. Consequently the defendant's conduct in this case does not constitute the collection and broadcast of news. Rather it constitutes a seizure of the plaintiff's proprietary interest in the publicity value of his likeness.

I would reverse and remand for trial on the issue of the defendant's appropriation of the plaintiff's right of publicity as herein delineated. Consequently I concur only in the judgment of the majority.

**JUDGMENT ENTRY OF THE COURT OF COMMON  
PLEAS RE SUMMARY JUDGMENT**

(Dated April 29, 1974)

No. 918826

IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, CUYAHOGA COUNTY

---

HUGO ZACCHINI,  
Plaintiff,

vs.

SCRIPPS-HOWARD COMPANY,  
Defendant.

---

Defendant's Motion for Summary Judgment granted.

A48

**JUDGMENT ENTRY OF THE COURT  
OF COMMON PLEAS**

(Dated April 29, 1974)

No. 918826

**IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, CUYAHOGA COUNTY**

---

**HUGO ZACCHINI,**  
*Plaintiff,*

**vs.**

**SCRIPPS-HOWARD COMPANY,**  
*Defendant.*

---

**Judgment for Defendant.**

A49

**RECORD FILED IN THE COURT OF  
COMMON PLEAS**

No. 73 918826

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

---

**HUGO ZACCHINI,**  
*Plaintiff,*

**vs.**

**WEWS SCRIPPS HOWARD BROADCASTING CO.,**  
*Defendant.*

---

**COMPLAINT**

(Filed in Common Pleas Court July 2, 1973)

1. Now comes the plaintiff and says that WEWS Scripps Howard Broadcasting Company is a duly organized corporation, existing pursuant to law, and at all times herein mentioned, was engaged in the television broadcasting business.

2. Plaintiff says that he is engaged in the entertainment business and that the act which he performs is an act which was invented by his father and has been performed only by his family for the last fifty years.

3. While performing at the Burton Fair, he was approached by an employee of the defendant with regard to filming his performance, at which time, he requested that his performance not be filmed.



4. Plaintiff further says that on or about the 1st day of September, 1972, an employee of the defendant filmed the plaintiff's entire act, while he was performing at the Burton Fair, and subsequently, showed the film on defendant's T.V. Station in Cleveland, Ohio.

5. Plaintiff further says that the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) together with all costs of suit.

A TRIAL BY JURY IS HEREBY REQUESTED.

/s/ John G. Lancione

Spangenberg, Shibley, Traci & Lancione  
1500 National City Bank Building  
Cleveland, Ohio 44114  
Of Counsel

## ANSWER

(Filed in Common Pleas Court October 2, 1973)

### FIRST DEFENSE

1. Defendant, Scripps-Howard Broadcasting Company, incorrectly designated as "WEWS Scripps-Howard Broadcasting Co.," admits and avers that it is a corporation organized under and existing by virtue of the laws of the State of Ohio and at all times mentioned in the complaint was engaged in the business of TV broadcasting.

2. Defendant says that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the complaint.

3. Defendant admits that plaintiff was at the Burton Fair, but denies each and every other allegation made and contained in paragraph 3 of the complaint.

4. Defendant admits that a news cameraman filmed the plaintiff on or about September 1, 1972, and that such film was subsequently shown on Channel 5 - WEWS, but denies each and every other allegation made and contained in paragraph 4 of the complaint.

5. Defendant denies each and every allegation made and contained in paragraph 5 of the complaint.

### SECOND DEFENSE

6. Defendant avers that the complaint fails to state a claim upon which relief can be granted.

### THIRD DEFENSE

7. For its third defense, defendant incorporates herein all of the allegations, averments, statements, admissions and denials contained in its first defense.

8. Defendant avers that the citizens of the State of Ohio have a general public interest in the activities being conducted at Fairs and particularly those of the Burton Fair, and that it is an important function and duty of a TV station to report matters of general public interest and the right to report such activities is guaranteed by the rights of freedom of speech and freedom of the press as contained in the Constitution of the United States and the State of Ohio.

9. The showing of the film complained of related to matters of general public interest and were shown without malice and within the rights guaranteed to the defendant by the Constitution of the United States and the State of Ohio and was, therefore, constitutionally privileged.

/s/ Don H. Pace

Baker, Hostetler & Patterson

1956 Union Commerce Building  
Cleveland, Ohio 44115

*Attorneys for Defendant*

### MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, SCRIPPS-HOWARD BROADCASTING COMPANY

(Filed in Common Pleas Court March 11, 1974)

Defendant, Scripps-Howard Broadcasting Company (incorrectly designated in plaintiff's complaint as WEWS Scripps-Howard Broadcasting Co.), by and through its attorneys and pursuant to Civil Rule 56(B), respectfully moves this Court to enter summary judgment in favor of its dismissing the action on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law on the grounds and for the reasons stated in the brief attached hereto.

The motion is based upon the Affidavits of George J. Masur and David F. Patterson attached hereto marked Exhibits A and B respectively.

/s/ Don H. Pace

/s/ Lawrence V. Lindberg

1956 Union Commerce Building  
Cleveland, Ohio 44115

621-0200

*Attorneys for Defendant, Scripps-Howard Broadcasting Company*

*Of Counsel:*

Baker, Hostetler & Patterson

1956 Union Commerce Building  
Cleveland, Ohio 44115

621-0200

**EXHIBIT A****Affidavit of George J. Masur**

George J. Masur, being duly sworn deposes and says:

1. I am now employed as staff news writer with the defendant Scripps-Howard Broadcasting Company. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. In my professional capacity as a news reporter I use the name Jay Bacchus rather than my legal name of George J. Masur.

3. That during August and September of 1972 I was employed by defendant as a free lance news reporter and cameraman (also referred to as a "news stringer").

4. While employed as a news stringer, I submitted ideas for news stories to defendant's news management personnel who, if they accepted the idea, would direct me to cover the event or story. At other times, news management personnel of defendant would, on their own initiative, direct me to cover a particular news event or story.

5. On or about August 30, 1972 I attended the Burton Fair in the hope of finding a newsworthy event which could be used by WEWS on its news programs. As is my custom I carried with me a small movie camera supplied by the defendant.

6. While in attendance at the fair, I witnessed plaintiff's performance. His act consisted of him being shot out of a cannon into a net located approximately 200 feet away.

7. Plaintiff performed in a fenced-in track area which was surrounded by grandstands. There was no separate

admission charge for his performance and his act was witnessed by members of the general public in attendance at the fair.

8. Prior to his performance, on or about August 30, 1972, plaintiff approached me and inquired about my camera, my occupation and my purpose for being at the fair.

9. On or about August 30, 1972 plaintiff requested that his act not be filmed. I informed him that I was attempting to develop film to attract the public's attention to the fair and that although I did not intend to do so that day he had no right to restrict my right to film a newsworthy event.

10. On September 1, 1972, in response to inquiries made by Robert Feldman, producer of defendant's Eyewitness News Program, I mentioned that plaintiff's act had generated substantial public interest at the Burton Fair but that Zacchini had requested that the act not be filmed.

11. On September 1, 1972, Robert Feldman directed me to cover the attractions at the Burton Fair and to film plaintiff's act.

12. On September 1, 1972, I again went to the Burton Fair at which time I shot footage of plaintiff's performance. The film was submitted to defendant for use on that evening's eleven o'clock Eyewitness News Program.

13. On both occasions when I attended the Burton Fair, I entered the fairgrounds without being required to pay any admission charge. News reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair.



14. At no time while I was in attendance at the Burton Fair did any fair official or any person other than plaintiff request or demand that I not cover the Burton Fair or that I not film all or portions of the events and activities of the fair.

Further affiant sayeth not.

/s/ George J. Masur

(Jurat omitted)

### EXHIBIT B

#### Affidavit of David F. Patterson

David F. Patterson, being duly sworn deposes and says:

1. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. I am employed by the defendant Scripps-Howard Broadcasting Company as co-anchorman on defendant's eleven o'clock Eyewitness News Program.

3. On or about September 1, 1972, during the eleven o'clock Eyewitness News Program of WEWS, a fifteen second news film clip of plaintiff's act was televised.

4. While the film clip of plaintiff's act was being shown I read the script, a true copy of which is attached hereto as Exhibit B-1.

Further affiant sayeth not.

/s/ David F. Patterson

(Jurat omitted)

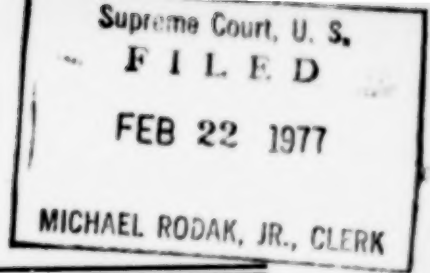
### EXHIBIT B-1

Transcript of Script Relating to Film Clip of The Fabulous Zacchini Read by David F. Patterson on Defendant's Eyewitness News Program on September 1, 1973:

This . . . now . . . is the story of a *true spectator sport* . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . .

**APPENDIX**

---



**Supreme Court of the United States**

---

**October Term, 1976**

**No. 76-577**

---

**HUGO ZACCHINI,**  
*Petitioner,*

**vs.**

**SCRIPPS-HOWARD BROADCASTING COMPANY,**  
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO**

---

**Petition for Certiorari Filed October 23, 1976**  
**Certiorari Granted January 10, 1977**

## TABLE OF CONTENTS

Relevant Docket Entries .....	1
Complaint (July 2, 1973) .....	4
Answer (October 2, 1973) .....	5
Motion for Summary Judgment by Defendant, Scripps-Howard Broadcasting Company (March 11, 1974) .....	7
Exhibit A. Affidavit of George J. Masur .....	8
Exhibit B. Affidavit of David F. Patterson .....	11
Exhibit B-1. Transcript of Script Relating to Film Clip .....	12
Decisions Below:	
Judgment Entry of the Court of Common Pleas Re Summary Judgment (April 29, 1974) .....	12
Judgment Entry of the Court of Common Pleas (April 29, 1974) .....	13
Journal Entry of the Court of Appeals (July 10, 1975) .....	13
Opinion of the Court of Appeals (July 10, 1975) .....	14
Judgment Entry of the Supreme Court of Ohio (July 28, 1976) .....	15
Opinion of the Supreme Court of Ohio (July 28, 1976) .....	15



No. 73 918826

## **In the Court of Common Pleas**

CUYAHOGA COUNTY, OHIO

---

HUGO ZACCHINI,  
*Plaintiff,*

vs.

SCRIPPS-HOWARD COMPANY,  
*Defendant.*

---

### **RELEVANT DOCKET ENTRIES**

July 2, 1973	Complaint with jury demand filed and summons sent certified mail to defendant
July 11, 1973	Certified mail Receipt No. 41213439 Returned by U.S. Postal Dept. Mail received by Addressee 7-6-73
October 2, 1973	Answer of defendant filed
March 11, 1974	Motion for leave to file Motion for Summary Judgment filed by defendant
April 15, 1974	Brief in Opposition to Defendant's Motion for Summary Judgment filed
April 30, 1974	To Court. Defendant's motion for summary judgment granted. O.S.J.
May 17, 1974	Notice of appeal filed by plaintiff Copy mailed to appellee

June 26, 1974 Record on appeal filed and notice issued to all parties

June 26, 1974 Transcript of proceedings filed by appellant

August 27, 1975 To Court. Judgment of the Common Pleas Court is reversed. See Journal

August 19, 1976 Judgment of Court of Appeals is reversed and judgment of Common Pleas is reinstated

**Cuyahoga County Court of Appeals Docket**  
**Case No. 33713**

May 17, 1974 Appeal by Hugo Zacchini, Plaintiff-Appellant, Jan. Term, 1974, Notice of Appeal filed

June 26, 1974 Record on appeal filed and notice issued to all parties

August 23, 1974 Brief and Assignment of Errors of Plaintiff-Appellant

September 12, 1974 Brief of Appellee

August 26, 1975 Judgment of Common Pleas Court reversed and remanded for further proceedings

Appellee to pay costs. Mandate to issue. Appellee excepts

September 24, 1975 Notice of appeal to the Supreme Court of Ohio filed by appellant

**Supreme Court of the State of Ohio Docket**  
**Case No. 75-995**

October 24, 1975 Notice of Appeal and Certificate of Service filed

October 27, 1975 Memo of Appellant and Certificate of Service filed

November 24, 1975 Memo of Appellee filed and A.P.S.

December 5, 1975 Order to Certify Record sent—Clerk of Courts

December 5, 1975 Cause docketed on its merits

December 5, 1975 Motion to Certify Record allowed

December 29, 1975 Original papers filed

January 28, 1976 Printed record filed

February 9, 1976 Brief of Appellant and Certificate of Service filed

March 8, 1976 Brief of Appellee filed

July 28, 1976 Judgment reversed

August 5, 1976 Original papers B.E. sent to Clerk

August 17, 1976 Certified copy of entry sent to Clerk

August 17, 1976 Mandate issued

January 18, 1977 Entry from U.S. Supreme Court filed, Certiorari allowed

No. 73 918826

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

HUGO ZACCHINI,  
*Plaintiff,*

vs.

WEWS SCRIPPS HOWARD BROADCASTING CO.,  
*Defendant.*

**COMPLAINT**

(Filed in Common Pleas Court July 2, 1973)

1. Now comes the plaintiff and says that WEWS Scripps Howard Broadcasting Company is a duly organized corporation, existing pursuant to law, and at all times herein mentioned, was engaged in the television broadcasting business.

2. Plaintiff says that he is engaged in the entertainment business and that the act which he performs is an act which was invented by his father and has been performed only by his family for the last fifty years.

3. While performing at the Burton Fair, he was approached by an employee of the defendant with regard to filming his performance, at which time, he requested that his performance not be filmed.

4. Plaintiff further says that on or about the 1st day of September, 1972, an employee of the defendant filmed the plaintiff's entire act, while he was performing at the Burton Fair, and subsequently, showed the film on defendant's T.V. Station in Cleveland, Ohio.

5. Plaintiff further says that the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) together with all costs of suit.

A TRIAL BY JURY IS HEREBY REQUESTED.

/s/ John G. Lancione

Spangenberg, Shibley, Traci & Lancione

1500 National City Bank Building

Cleveland, Ohio 44114

*Of Counsel*

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

(Title omitted in printing)

**ANSWER**

(October 2, 1973)

**FIRST DEFENSE**

1. Defendant, Scripps-Howard Broadcasting Company, incorrectly designated as "WEWS Scripps-Howard Broadcasting Co.," admits and avers that it is a corporation organized under and existing by virtue of the laws of the State of Ohio and at all times mentioned in the complaint was engaged in the business of TV broadcasting.

2. Defendant says that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the complaint.



3. Defendant admits that plaintiff was at the Burton Fair, but denies each and every other allegation made and contained in paragraph 3 of the complaint.

4. Defendant admits that a news cameraman filmed the plaintiff on or about September 1, 1972, and that such film was subsequently shown on Channel 5 - WEWS, but denies each and every other allegation made and contained in paragraph 4 of the complaint.

5. Defendant denies each and every allegation made and contained in paragraph 5 of the complaint.

#### SECOND DEFENSE

6. Defendant avers that the complaint fails to state a claim upon which relief can be granted.

#### THIRD DEFENSE

7. For its third defense, defendant incorporates herein all of the allegations, averments, statements, admissions and denials contained in its first defense.

8. Defendant avers that the citizens of the State of Ohio have a general public interest in the activities being conducted at Fairs and particularly those of the Burton Fair, and that it is an important function and duty of a TV station to report matters of general public interest and the right to report such activities is guaranteed by the rights of freedom of speech and freedom of the press as contained in the Constitution of the United States and the State of Ohio.

9. The showing of the film complained of related to matters of general public interest and were shown without malice and within the rights guaranteed to the defendant by the Constitution of the United States and the

State of Ohio and was, therefore, constitutionally privileged.

/s/ Don H. Pace  
Baker, Hostetler & Patterson  
1956 Union Commerce Building  
Cleveland, Ohio 44115  
*Attorneys for Defendant*

IN THE COMMON PLEAS COURT  
CUYAHOGA COUNTY, OHIO

(Title Omitted in Printing)

#### **MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, SCRIPPS-HOWARD BROADCASTING COMPANY**

(March 11, 1974)

Defendant, Scripps-Howard Broadcasting Company (incorrectly designated in plaintiff's complaint as WEWS Scripps-Howard Broadcasting Co.), by and through its attorneys and pursuant to Civil Rule 56(B), respectfully moves this Court to enter summary judgment in favor of its dismissing the action on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law on the grounds and for the reasons stated in the brief attached hereto.

The motion is based upon the Affidavits of George J. Masur and David F. Patterson attached hereto marked Exhibits A and B respectively.

/s/ Don H. Pace

/s/ Lawrence V. Lindberg

1956 Union Commerce Building  
Cleveland, Ohio 44115  
621-0200

*Attorneys for Defendant, Scripps-Howard Broadcasting Company*

*Of Counsel:*

Baker, Hostetler & Patterson

1956 Union Commerce Building  
Cleveland, Ohio 44115  
621-0200

## EXHIBIT A

### Affidavit of George J. Masur

George J. Masur, being duly sworn deposes and says:

1. I am now employed as staff news writer with the defendant Scripps-Howard Broadcasting Company. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. In my professional capacity as a news reporter I use the name Jay Bacchus rather than my legal name of George J. Masur.

3. That during August and September of 1972 I was employed by defendant as a free lance news reporter and cameraman (also referred to as a "news stringer").

4. While employed as a news stringer, I submitted ideas for news stories to defendant's news management personnel who, if they accepted the idea, would direct me to cover the event or story. At other times, news management personnel of defendant would, on their own initiative, direct me to cover a particular news event or story.

5. On or about August 30, 1972 I attended the Burton Fair in the hope of finding a newsworthy event which could be used by WEWS on its news programs. As is my custom I carried with me a small movie camera supplied by the defendant.

6. While in attendance at the fair, I witnessed plaintiff's performance. His act consisted of him being shot out of a cannon into a net located approximately 200 feet away.

7. Plaintiff performed in a fenced-in track area which was surrounded by grandstands. There was no separate admission charge for his performance and his act was witnessed by members of the general public in attendance at the fair.

8. Prior to his performance, on or about August 30, 1972, plaintiff approached me and inquired about my camera, my occupation and my purpose for being at the fair.

9. On or about August 30, 1972 plaintiff requested that his act not be filmed. I informed him that I was attempting to develop film to attract the public's attention to the fair and that although I did not intend to do so that day he had no right to restrict my right to film a newsworthy event.

10. On September 1, 1972, in response to inquiries made by Robert Feldman, producer of defendant's Eyewitness News Program, I mentioned that plaintiff's act had generated substantial public interest at the Burton Fair but that Zacchini had requested that the act not be filmed.

11. On September 1, 1972, Robert Feldman directed me to cover the attractions at the Burton Fair and to film plaintiff's act.

12. On September 1, 1972, I again went to the Burton Fair at which time I shot footage of plaintiff's performance. The film was submitted to defendant for use on that evening's eleven o'clock Eyewitness News Program.

13. On both occasions when I attended the Burton Fair, I entered the fairgrounds without being required to pay any admission charge. News reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair.

14. At no time while I was in attendance at the Burton Fair did any fair official or any person other than plaintiff request or demand that I not cover the Burton Fair or that I not film all or portions of the events and activities of the fair.

Further affiant sayeth not.

/s/ George J. Masur

(Jurat omitted)

## **EXHIBIT B**

### **Affidavit of David F. Patterson**

David F. Patterson, being duly sworn deposes and says:

1. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. I am employed by the defendant Scripps-Howard Broadcasting Company as co-anchorman on defendant's eleven o'clock Eyewitness News Program.

3. On or about September 1, 1972, during the eleven o'clock Eyewitness News Program of WEWS, a fifteen second news film clip of plaintiff's act was televised.

4. While the film clip of plaintiff's act was being shown I read the script, a true copy of which is attached hereto as Exhibit B-1.

Further affiant sayeth not.

/s/ David F. Patterson

(Jurat omitted)



**EXHIBIT B-1**

Transcript of Script Relating to Film Clip of The Fabulous Zacchini Read by David F. Patterson on Defendant's Eyewitness News Program on September 1, 1973:

This . . . now . . . is the story of a *true spectator sport* . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long act*, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . .

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

(Title Omitted in Printing)

**JUDGMENT ENTRY OF THE COURT OF COMMON  
PLEAS RE SUMMARY JUDGMENT**

(Dated April 29, 1974)

Defendant's Motion for Summary Judgment granted.

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

(Title Omitted in Printing)

**JUDGMENT ENTRY OF THE COURT  
OF COMMON PLEAS**

(Dated April 29, 1974)

Judgment for Defendant.

COURT OF APPEALS OF OHIO  
EIGHTH APPELLATE DISTRICT

(Title Omitted in Printing)

**JOURNAL ENTRY OF THE COURT OF APPEALS**

(Dated July 10, 1975)

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

See Opinion Incorporated in This Journal Entry by Reference. See Also MANOS, J., Concurring Opinion.

No other error appearing in the record, this cause is reversed and remanded to the Common Pleas Court for further proceedings in accordance with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ Jack G. Day  
Presiding Judge

DAY, P.J., MANOS, J., Concur in Judgment Only

(See Concurring Opinion)

PARRINO, J., Concur

# COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT

(Title Omitted in Printing)

## OPINION OF THE COURT OF APPEALS

### Note:

The Opinion of the Court of Appeals is printed in the Petition for Certiorari at page A27.

# IN THE SUPREME COURT OF OHIO

(Title Omitted in Printing)

## JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Decided July 28, 1976)

Judgment reversed.

# IN THE SUPREME COURT OF OHIO

(Title Omitted in Printing)

## OPINION OF THE SUPREME COURT OF OHIO

### Note:

The Opinion of the Ohio Supreme Court is printed in the Petition for Certiorari at page A2.

DEC 1 1976

MICHAEL BOBAY, JR., CLERK

# Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,

*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT

## BRIEF OF RESPONDENT IN OPPOSITION

EZRA K. BRYAN

DON H. PACE

LAWRENCE V. LINDBERG

BAKER, HOSTETLER & PATTERSON

1956 Union Commerce Building

Cleveland, Ohio 44115

(216) 621-0200

*Counsel for Respondent*



## TABLE OF CONTENTS

---

Questions Presented .....	1
Constitutional and Statutory Provisions Involved in This Petition Which Were Not Reproduced by Pe- titioner .....	2
Counterstatement of the Case .....	3
Reasons for Denying Writ .....	4
1. No Title, Right, Privilege or Immunity Is Spe- cially Set Up or Claimed Under the Constitution, Treaties or Statutes of the United States .....	4
2. The Ohio Supreme Court's Decision Was Founded Upon an Adequate and Independent State Ground .....	6
3. The Limitations Placed on Ohio's Common Law Right of Publicity Are Consistent With the First Amendment Protection Accorded the Press in the Gathering and Dissemination of News .....	8
4. There Are No Special or Important Reasons for Review of This Case by This Supreme Court ....	12
Conclusion .....	15

## TABLE OF AUTHORITIES

### Cases

<i>Berea College v. Kentucky</i> , 211 U.S. 45 (1908) .....	7
<i>Cantrell v. Forest City Publishing Co.</i> , 419 U.S. 245 (1974) .....	10, 15
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975) .....	10, 12
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967) ....	9
<i>Durley v. Mayo</i> , 351 U.S. 277 (1956) .....	7-8
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .....	11, 15
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945) .....	7
<i>Johnson v. Scripps Publishing Co.</i> , 18 Ohio Ops. 372, 32 Ohio L. Abs. 423 (C.P. Cuyahoga Co. 1940) .....	6
<i>Man v. Warner Bros., Inc.</i> , 317 F. Supp. 50 (S.D.N.Y. 1970) .....	13, 14
<i>Martin v. F.I.Y. Theatre Co.</i> , 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (C.P. Cuyahoga Co. 1938) .....	6
<i>Murdock v. Memphis</i> , 87 U.S. 590 (1874) .....	7
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) ....	8, 12
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976) .....	11
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967) .....	9, 10, 11, 12, 14
<i>Time, Inc. v. McLaney</i> , 406 F.2d 565 (5th Cir.), cert. denied 395 U.S. 922 (1969) .....	14
<i>Washington Post Co. v. Keogh</i> , 365 F.2d 965 (D.C. Cir. 1966), cert. denied 385 U.S. 1011 (1967) .....	14
<i>Williams v. Kaiser</i> , 323 U.S. 471 (1945) .....	8

### Constitutions, Statutes and Rules

Ohio Constitution, Article I, Section 11 .....	1, 2, 6
Rules of the United States Supreme Court, Rule 19 .....	12

United States Code, Title 28, Section 1257(3) .....	1, 2, 4, 5
United States Constitution, First Amendment .....	1, 6, 8, 10, 12, 14, 16

# Supreme Court of the United States

---

October Term, 1976

No. 76-577

---

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT

---

## BRIEF OF RESPONDENT IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Whether the United States Supreme Court has jurisdiction under 28 U.S.C. §1257(3) to review a decision of the Ohio Supreme Court which creates a common law right of publicity and establishes two specific limitations on that right based upon the free speech and press guarantees of Article I, Section 11 of the Ohio Constitution and the First Amendment to the Federal Constitution.

2. Whether the constitutional guarantees of free speech and press, relied upon by the Ohio Supreme Court in imposing limitations on Ohio's common law "right of



publicity", privileged Respondent's single news use of a fifteen second film clip of Petitioner's public performance which was a matter of legitimate public interest.

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED IN THIS PETITION WHICH WERE  
NOT REPRODUCED BY PETITIONER**

**Constitution of Ohio—Article I, Section 11:**

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

**United States Code, Title 28, Section 1257(3):**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \* \* \*

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

\* \* \* \* \*

**COUNTERSTATEMENT OF THE CASE**

Petitioner's Statement of the Case adequately presents the history of this action, however undisputed facts relevant to the Ohio Supreme Court's decision were not clearly stated. These facts are as follows:

In August and September of 1972, Petitioner, Hugo Zacchini, regularly performed his "human cannonball" act for members of the general public attending the Geauga County Fair, in Burton, Ohio (App. pp. 54-55).<sup>\*</sup> His performance lasted about fifteen seconds during which he was projected out of a cannon-like object into a net some two hundred feet away (App. pp. 54-56). No separate admission fee was charged to view his act, rather his performance was staged in an open grandstand area for the benefit of all persons in general attendance at the fair (App. pp. 54-55).

On September 1, 1972, a freelance news reporter for Respondent attended the Geauga County Fair and filmed Petitioner's performance over his verbal objection (App. pp. 54-55). Petitioner's act had generated substantial public interest at the fair and, in keeping with Respondent's commitment to present a broad range of news and information to the public, Respondent determined that plaintiff's act, as publicly performed, would be of interest to its viewers and would call the public's attention to the fair's attractions by informing its viewers of a special feature (App. pp. 54-56). Promoters of the fair encouraged news

---

<sup>\*</sup>The following abbreviations will be used throughout this brief:

Pet. p. ....: The Petition for Writ of Certiorari;

App. p. ....: The Appendix to the Petition for Writ of Certiorari.

coverage of Respondent's act, all reporters and cameramen being admitted to the fair *without charge* so that the fair would receive publicity from the news coverage (App. pp. 55-56).

Respondent broadcast a fifteen second news film clip of Petitioner's act *once* on its eleven o'clock Eyewitness News program on September 1, 1972 (App. p. 56). While the film clip was being shown newscaster David Patterson described the act as a "thriller" which "you really need to see . . . *in person* . . . to appreciate it . . ." (App. p. 57).

### REASONS FOR DENYING WRIT

The writ of certiorari should be denied for each of the following separate and independent reasons:

#### 1. No Title, Right, Privilege or Immunity Is Specially Set Up or Claimed Under the Constitution, Treaties or Statutes of the United States.

Petitioner has totally ignored the threshold requirement of 28 U.S.C. §1257(3) that there must be a Federal right which has been infringed by the decision of the state court before this Supreme Court has jurisdiction to review it. In this case Petitioner's only claim is that the Ohio Supreme Court, in recognizing a performer's "right of publicity", imposed unreasonable restrictions on it (Pet. p. 21).

The decision of the Ohio Supreme Court establishes that under the common law of Ohio "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy . . ." (App. p. 2). In formulating its decision

the Court had to consider and decide not only whether Ohio should recognize such a common law right but also what restrictions, limitations and defenses should apply to that right.

Implicit in the Ohio Supreme Court's power to recognize new common law rights is the power to define the perimeters of these rights. Surely the power to determine that Ohio will recognize a cause of action for invasion of the right of publicity carries with it the obligation on the Ohio Supreme Court to delineate both the prerequisites to such a claim and the privileges which constitute defenses thereto.

The issue sought to be reviewed by Petitioner does not concern any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of the United States. 28 U.S.C. §1257(3). Rather Petitioner asks that this Supreme Court review the common law of Ohio and render an opinion on the propriety of the limitations placed on that right by the Ohio Supreme Court. Petitioner's complete disregard of the requirement that a federal right be infringed before this Court may exercise jurisdiction is highlighted by Petitioner's own statement that "[s]hould review be granted, direction can be focused upon the formulation of an appropriate standard to replace that adopted by the Ohio Supreme Court" (Pet. p. 21). Petitioner's plea, that this Supreme Court intervene in the development of Ohio's common law rights which have no federal basis, demonstrates the absence of a jurisdictional basis for this appeal. Review of the sort sought by Petitioner is not contemplated by Section 1257(3).

Respondent respectfully submits that this Supreme Court lacks jurisdiction to review this case.



## 2. The Ohio Supreme Court's Decision Was Founded Upon an Adequate and Independent State Ground.

In seeking review by the Ohio Supreme Court Respondent's first proposition of law read as follows:

A television station is privileged under Article I, Section 11 of the Ohio Constitution and the First Amendment to the Federal Constitution to film a public performance by a "human cannonball" and broadcast a fifteen second film clip of the performance on its news program. (See Pet. p. 5).

This proposition of law focused upon the strong protection granted to speech and publication by Ohio's Constitution as well as the free press guarantees of the First Amendment. Although the guarantees of Article I, Section 11 of the Ohio Constitution parallel those of the First Amendment they are nevertheless separate and independent and represent Ohio's deep commitment to the principles of free speech and free press. For nearly forty years state courts in Ohio have followed the principle of law applied by the Ohio Supreme Court in this case, that "the right to privacy does not prohibit publication of matter which is of public or general interest." *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 431, 18 Ohio Ops. 372 (C.P. Cuyahoga Co. 1940); *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (C.P. Cuyahoga Co. 1938).

The Ohio Supreme Court's response to Respondent's first proposition of law was direct and encompassed both the state and federal free press guarantees:

A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of pub-

licity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual (App. p. 2).

This Court has repeatedly stated that it will not review state court judgments based upon an adequate and independent nonfederal ground, even where a federal question is involved. *Murdock v. Memphis*, 87 U.S. 590, 634-636 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). As Justice Jackson wrote in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945):

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (citation omitted) \* \* \* The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *And our power is to correct wrong judgments, not to revise opinions.* We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion. (Emphasis added).

In limiting the common law right of publicity in Ohio, the Ohio Supreme Court drew upon both state and federal constitutional guarantees. In such cases a presumption arises that the decision is based upon the nonfederal ground if the record is adequate to support it. *Durley v. Mayo*,



351 U.S. 277, 281 (1956). "And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." *Williams v. Kaiser*, 323 U.S. 471, 477 (1945).

The issues before the Ohio Supreme Court in this case were essentially issues of state law. The Ohio Supreme Court considered and dismissed Petitioner's claims based on state law theories of conversion and common law copyright. The Court then concluded that Petitioner stated a claim under state law for invasion of the right of publicity but held that this common law right was limited where the matter reported was of public interest.

The limitations placed on common law rights are best determined by the highest court of the state. The Ohio Supreme Court has concluded that free speech and press guarantees properly limit the extent of Petitioner's claim.

It is respectfully submitted that this Court does not have jurisdiction to review these limits.

### **3. The Limitations Placed on Ohio's Common Law Right of Publicity Are Consistent With First Amendment Protection Accorded the Press in the Gathering and Dissemination of News.**

Even though not reviewable by this Court, the decision of the Ohio Supreme Court in this case is consistent with the applicable decisions of this Court. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), this Court first articulated the constitutional standard that a public official is precluded from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless

disregard to whether it was false or not. This principle of constitutional law was founded on a profound national commitment to debate and discussion of public issues and a recognition that in presenting the news the press must be given breathing space in its choice and manner of presentation. *Id.* at 271-272.

In *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), this Court determined that all public figures should come within the purview of the "Times Rule". In the same year, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the "Times Rule" was applied to a suit based on the "false light" theory of the right of privacy. In *Hill, Id.* at 387-388, this Court held that:

[T]he constitutional protections for speech and press preclude the application of the New York (right of privacy) statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The Ohio Supreme Court properly held that the underlying principle of *Time, Inc. v. Hill* "is that freedom of the press inevitably imposes certain limits upon an individual's right of privacy." (App. p. 12). The Court determined that this principle should govern right of publicity actions arising under the common law of Ohio. Justice Brennan's words in *Time, Inc. v. Hill, supra* at 388-389, therefore reflect not only the required federal constitutional limitations but also provide a basis for the limitations which the Ohio Supreme Court determined should govern right of publicity actions in Ohio:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy govern-

ment. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Winters v. New York*, 333 U.S. 507, 510 . . .

Most recently, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court had occasion to consider a claim for damages for invasion of privacy caused by the publication of the name of a deceased rape victim. This case was the first opportunity for this Court to apply First Amendment protection to *truthful* reports which admittedly invaded a *private individual's* right to be free from public disclosure of private facts. Prior decisions of this Court had considered only the "false light" aspect of right of privacy which is more akin to defamation. See e.g., *Time, Inc. v. Hill*, *supra*, and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

In *Cox*, *supra* at 496, this Court concluded that the First Amendment "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." The essence of the Court's opinion in *Cox* is that truthful reports of public matters cannot form the basis for a right of privacy claim. Justice Powell, in concurring in the judgment, recognized the clear implication of the *Cox* decision:

Today's opinion reiterates what we previously have recognized, see *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)—that the defense of truth is constitutionally required when the subject of the alleged defamation is a public figure. *Ante*, at 489-490. Indeed, even if not explicitly recognized, this determination is implicit in the Court's articulation of a standard of recovery that rests on knowing or reckless disregard of the truth. I think that the constitutional necessity of recognizing a defense of truth is equally implicit in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen. *Id.* at 498-499.

Petitioner argues that the decisions of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), limiting the "Times Rule" to communications concerning public officials and public figures call into question the Ohio Supreme Court's use of the rationale of *Time, Inc. v. Hill*, *supra*, in formulating limitations on the right of publicity. Such is not the case. Both *Gertz* and *Firestone* concerned the application of the privilege to *admittedly defamatory falsehoods* concerning *private individuals*. In those cases the Court was concerned with the strong state interest in protecting its private citizens from defamatory publications. No similar state interest exists in this case, for the report is admittedly *truthful* and the subject is plainly a *public figure*.

That Respondent was constitutionally privileged to broadcast a fifteen second film clip of Petitioner's act cannot be disputed. In fact Petitioner concedes that "[t]here can be no doubt that defendant [Respondent]



is entitled to some privilege under the First Amendment." (Pet. pp. 20-21). Petitioner takes issue only with the extent of the privilege (Pet. p. 21). The Ohio Supreme Court's limitations on this privilege provide more than adequate protection against serious abuses of a performer's rights. If the actual intent of the news media is to appropriate the benefit of the publicity for private use then the privilege accorded the press in disseminating the news would not apply. Similarly if the actual intent of the broadcaster is to cause financial or other injury to the performer the privilege would not be effective. In an appropriate case these limitations on freedom of the press might very well be held by this Court to be too restrictive under the First Amendment.

Neither limitation is applicable in the instant case. The favorable treatment given Petitioner in the broadcast certainly refutes any claim that Respondent intended to cause Petitioner injury. Similarly, Respondent's single use of the film clip on its news program could hardly evidence an intention to appropriate the act for private benefit.

The Ohio Supreme Court's application of free speech and free press guarantees to the common law right of publicity is a reaffirmation of Ohio's concern that the press be given the breathing space it needs to survive. And the Court's limitations on the new found right of publicity are consistent with the federal constitutional principles of *New York Times Co. v. Sullivan*, *Time, Inc. v. Hill*, and *Cox Broadcasting Corp. v. Cohn*.

#### **4. There Are No Special or Important Reasons for Review of This Case by This Supreme Court.**

Rule 19 of the Rules of the Supreme Court of the United States provides, in part, that:

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Petitioner has presented no special or important reasons for review by this Court and none exist. Rather several factors weigh heavily against the grant of the writ prayed for.

First, the facts of this case are extremely unique and there is little likelihood that a similar case will ever arise. A decision by this Court on these facts would have little, if any, general application.

Secondly, performers, such as Petitioner, have sufficient means to prevent media coverage if they really do not want it. They may require their promoters to include on tickets and programs an explicit prohibition against mechanical reproduction. Moreover, the news media has no interest in reproducing lengthy segments of an individual's performance. Petitioner's statement that the Ohio Supreme Court's opinion would protect the filming and broadcasting of an entire performance by the Cleveland Symphony (Pet. p. 21) is ludicrous for such an action would be evidence of an intention to appropriate the benefit of the publicity for non-privileged private use rather than news use (App. p. 2).

Thirdly, Respondent's use of the film clip of Petitioner's act was clearly *de minimis* and thus too insubstantial to warrant review by this Court. In *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970), a Federal District Court found that even *commercial* use of a forty-five second film clip of plaintiff's entire musical performance did not provide the basis for a claim under New York's right



of privacy statute. The Court's holding in *Man*, *supra* at 53 is directly in point here:

Finally, the incidental use of plaintiff's forty-five second performance in defendants' motion picture of this public event is surely *de minimis*. Cf. *University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp.*, *supra*; *Damron v. Doubleday, Doran & Co.*, 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct., N.Y. Co. 1928), *aff'd* 226 App. Div. 796, 234 N.Y.S. 773 (1st Dep't. 1929).

While the Ohio Supreme Court did not have to rely upon the *de minimis* theory in dismissing Petitioner's claim since the limitations placed by the Court on the right of publicity precluded recovery, the Court nevertheless suggested that Petitioner's claim was insubstantial (App. p. 14, Note 5).

Fourthly, this lawsuit has continued for over three years. During that period Respondent has expended considerable time and money in defense of its right to present the news. This and other Federal Courts have repeatedly recognized that to defend a claim for libel or invasion of privacy acts as a substantial deterrent to the free exercise of First Amendment rights. *Time, Inc. v. Hill*, *supra* at 389; *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir.), *cert. denied* 395 U.S. 922 (1969). "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1011 (1967).

This case, which began in July of 1973, should finally be put to rest. By granting Petitioner's writ this Court would extend these proceedings at least another year and

further discourage Respondent in the exercise of its rights under the Ohio and Federal Constitutions.

Finally, this case is not a proper one for a consideration of the constitutional standards to be applied to invasion of privacy cases. Its facts are unique and unlikely to be repeated. It concerns a "bastard" form of the right of privacy and not the more fundamental right of privacy claims of intrusion, public disclosure or false light, all of which have a much more profound effect upon a private individual than the rarely considered right of publicity. While this Court has questioned the application of the "Times Rule" to false light cases involving private individuals in *Gertz*, *supra*, and *Cantrell v. Forest City Publishing Co.*, *supra*, it has not suggested that limitations on common law rights may not be based upon free press guarantees. Moreover, the privilege to report on matters of public interest involving public figures has not been questioned by this Court.

## CONCLUSION

First—This Court does not have jurisdiction to hear this case for each of two reasons:

A. Petitioner does not even assert, much less have, any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States; and

B. The decision of the Ohio Supreme Court which Petitioner asks this Court to review is based upon an adequate and independent non-federal ground.

Second—Even if jurisdiction were present, review would not be justified because:

A. The decision by the Ohio Supreme Court is essentially consistent with and certainly is not repugnant to the First Amendment decisions of this Court; and

B. Facts so unique and so inconsequential are no basis for this Court to deal with constitutional standards applicable to right of privacy cases.

Respondent respectfully submits that the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

EZRA K. BRYAN

DON H. PACE

LAWRENCE V. LINDBERG

BAKER, HOSTETLER & PATTERSON

1956 Union Commerce Building

Cleveland, Ohio 44115

(216) 621-0200

*Counsel for Respondent, Scripps-  
Howard Broadcasting Co.*

# Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT

## PETITIONER'S REPLY BRIEF

JOHN G. LANCIONE  
SPANGENBERG, SHIBLEY, TRACI, LANCIONE  
AND MARKUS  
1500 National City Bank Bldg.  
Cleveland, Ohio 44114  
*Attorneys for Petitioner*



# Supreme Court of the United States

---

October Term, 1976

No. 76-577

---

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE OHIO SUPREME COURT

---

## PETITIONER'S REPLY BRIEF

---

In respondent's counterstatement of the case certain "facts" are recited which, petitioner submits are not supported by the record and the reliability of which may be quite pertinent to consideration of this proceeding.

Respondent represents that "Petitioner's act had generated substantial interest at the [Geauga County] fair." That statement derives from an affidavit in support of defendant's motion for summary judgment (App. p. 55). A fair reading of the affidavit indicates that what is presented as fact is rather the affiant's opinion as to the impact of the petitioner's performance. One man's opinion as to whether the general public was or was not substantially interested in petitioner's performance should not end the inquiry.

Similarly, respondent states that its appropriation of petitioner's act was "in keeping with Respondent's commitment to present a broad range of news and information to the public," and "would call the public's attention to the fair's attractions by informing its viewers of a special feature." Petitioner submits that there is nothing in the record which supports these noble assertions as to respondent's motivation.

Respondent has advanced four arguments in opposition to granting of the writ.

Petitioner is at a loss to understand respondent's first argument, that this action does not involve an important question of federal constitutional dimensions. The decision of the Ohio Supreme Court does not, as respondent suggests, merely involve issues of state law. There simply can be no denial that the dismissal of petitioner's action is predicated upon the Ohio Supreme Court's view of the extent of the immunity granted to the media under the First Amendment to the United States Constitution. The decision of the Ohio Supreme Court, sustaining respondent's claim of immunity, clearly involves a "right, privilege or immunity" "specially set up or claimed under the [United States] Constitution." 28 U.S.C. §1257(c).

Respondent's second argument is related to the first, in that it also proceeds from the premise that the questions resolved by the Ohio Supreme Court were all essentially issues of state law. The opinion of the Ohio Supreme Court speaks for itself, and petitioner can only urge that a full and fair reading of the opinion negates any such conclusion. While respondent's exposure to liability was a matter of state law, its immunity from any award of damages was plainly based upon federal constitutional grounds.

Respondent's third argument goes to the merits of petitioner's application for review. There is no point in

belaboring this aspect of the proceeding. Petitioner would, however, reiterate that the qualifications to the rule of immunity announced by the Ohio Supreme Court, to which respondent points as providing "more than adequate protection of serious abuses of a performer's rights," are in actuality meaningless (See, petitioner's brief pp. 12-13).

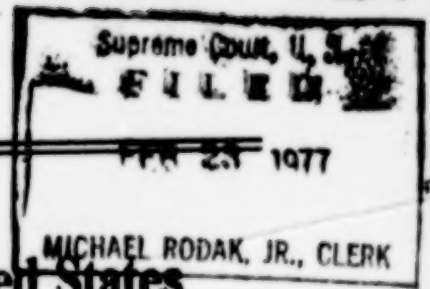
Finally, respondent argues that this case is a matter of *de minimis*, presenting no special or important reasons for review. In conjunction therewith respondent also appears to suggest that review should be denied because of the novel nature of the facts of this action.

Petitioner would reply that an erroneous ruling by a state supreme court on a First Amendment question of first impression cannot be passed off as *de minimis*. No matter how unique might be the facts which provide the foundation for the ruling, if the rule of constitutional law as adopted is of broad application such decision is a proper vehicle for review.

This action represents a case in which the Ohio Supreme Court has extended a First Amendment privilege beyond boundaries either necessary or proper, and certiorari should be granted to review that holding.

Respectfully submitted,

JOHN G. LANCIONE  
SPANGENBERG, SHIBLEY, TRACI, LANCIONE  
AND MARKUS  
1500 National City Bank Bldg.  
Cleveland, Ohio 44114  
*Attorneys for Petitioner*



---

# Supreme Court of the United States

---

October Term, 1976

No. 76-577

---

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

---

## BRIEF FOR PETITIONER

---

---

JOHN G. LANCIONE  
SPANGENBERG, SHIBLEY, TRACI  
AND LANCIONE  
1500 National City Bank Building  
Cleveland, Ohio 44114  
*Attorneys for Petitioner*



## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTIONAL STATEMENT .....	2
CONSTITUTIONAL PROVISION INVOLVED .....	2
QUESTION PRESENTED .....	2
STATEMENT OF THE CASE .....	3
SUMMARY OF ARGUMENT .....	8
ARGUMENT .....	10
I. Introduction .....	10
II. The Ohio Supreme Court Has Extended Virtual Total Immunity Under the First Amendment for Tortious Invasion of the Right of Publicity .....	11
III. The First Amendment Privilege As Defined Under <i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) and <i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967), Is Not Applicable to the Defense of the Tort of Invasion of a Performer's Right of Publicity .....	15
IV. <i>Time, Inc. v. Hill</i> Has Been So Substantially Affected by Subsequent Decisions of This Court That Reliance Upon It Alone Without Considerations of Those Rulings Is Erroneous .....	23
V. Specific First Amendment Standards Should Be Adopted Applicable to the Relationship of Public Performers and the Broadcast Media .....	29
CONCLUSION .....	33

## TABLE OF AUTHORITIES

## Cases

<i>Beckley Newspapers Corp. v. Hanks</i> , 389 U.S. 81 (1967)	24
<i>Buckley v. New York Post Corp.</i> , 373 F.2d 175	14
<i>Canessa v. J. I. Kislak, Inc.</i> , 97 N.J. Super. 327, 235 A.2d 62 (1967)	17
<i>Cantrell v. Forest City Publishing Co.</i> , 419 U.S. 245 (1974)	27
<i>Cox Broadcasting v. Cohn</i> , 420 U.S. 469 (1975)	27, 28
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)	14, 23, 24, 25, 27
<i>Dietemann v. Time, Inc.</i> , 284 F. Supp. 925 (C.D. Cal. 1968)	14
<i>Ettore v. Philco Television Broadcasting Corp.</i> , 229 F.2d 481 (3rd Cir. 1955)	16
<i>Garrison v. Louisiana</i> , 376 U.S. 64 (1964)	19
<i>Gautier v. Pro-Football</i> (1952), 304 N.Y. 354, 107 N.E. 2d 485	6, 10
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	8, 25, 27, 28, 29, 30
<i>Greenbelt Cooperative Publishing Assn. v. Bressler</i> , 398 U.S. 6 (1970)	24
<i>Haelan Laboratories v. Topps Chewing Gum</i> , 202 F.2d 866 (2nd Cir. 1953)	16
<i>Henry v. Collins</i> , 380 U.S. 356 (1965)	19
<i>Man v. Warner Bros., Inc.</i> , 317 F. Supp. 50 (S.D.N.Y. 1970)	10
<i>Monitor Patriot v. Roy</i> , 401 U.S. 265 (1971)	24
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	7, 8, 10, 11, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

<i>O'Brien v. Pabst Sales Co.</i> (5th Cir., 1942), 124 F.2d 167	6
<i>Ocala Star-Banner v. Damron</i> , 401 U.S. 295 (1971)	24
<i>Price v. Hal Roach Studios, Inc.</i> , 400 F. Supp. 836 (S.D. N.Y. 1975)	17
<i>Rosenblatt v. Baer</i> , 388 U.S. 75 (1966)	19
<i>Rosenbloom v. Metromedia</i> , 403 U.S. 29 (1971)	24, 25, 28
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448, 47 L. Ed. 2d 154 (1976)	8, 15
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	7, 8, 10, 11, 14, 15, 17, 19, 21, 22, 23, 27, 28, 29
<i>Time, Inc. v. Pape</i> , 401 U.S. 279 (1971)	24
<i>Uhlaender v. Henrickson</i> , 316 F. Supp. 1277 (Minn. 1970)	16

## Texts

14 O. JUR. 2d, Courts §247	5
Pember and Teiter, <i>Privacy and the Press Since Time, Inc. v. Hill</i> , 50 WASH. L.R. 57 (1974)	16
PROSSER, LAW OF TORTS (4th Ed., 1971), p. 804	16

## Constitutional Provisions and Statutes

Constitution of the United States, First Amendment	2, 9, 10, 11, 12, 13, 15, 18, 21, 22, 23, 25, 28, 29, 30, 31, 33
New York Civil Rights Law, Consol. Laws, c.6, §51	10
Constitution of Ohio, Article I, Section 11	10

# Supreme Court of the United States

---

October Term, 1976

No. 76-577

---

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

## BRIEF FOR PETITIONER

---

### OPINIONS BELOW

The opinion of the Ohio Supreme Court, appended at page A2 of the Petition for Certiorari, is reported at 47 Ohio St. 2d 224, ..... N.E.2d .....

The opinion of the Eighth District Court of Appeals of the State of Ohio (A27) of Petition for Certiorari is unreported.

No written opinion was entered by the trial court in the Court of Common Pleas for Cuyahoga County, Ohio.



## **JURISDICTIONAL STATEMENT**

The judgment of the Supreme Court of Ohio was entered on July 28, 1976, under docket number 75-995.

The petition for writ of certiorari was filed on October 23, 1976, and granted on January 10, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

## **CONSTITUTIONAL PROVISION INVOLVED**

### **United States Constitution, Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## **QUESTION PRESENTED**

Where a performer has a protected "right of publicity"—the right of exclusive control over the publication of his professional affairs—and that right is held as a matter of state law to have been infringed by a television station's filming of the performer's entire act over his specific objection and the broadcasting thereof on a nightly news show, to what extent, if at all, should the television station's tortious conduct be immunized by the First Amendment of the United States Constitution.

## **STATEMENT OF THE CASE**

The entire record in this action consists of plaintiff's complaint, defendant's answer and defendant's motion for summary judgment supported by two affidavits and an exhibit.

Plaintiff's complaint (App. p. 4), filed July 2, 1973, alleged that he is in the entertainment business; that he performs an act originated by his father and performed only by his family for fifty years; that while appearing at the Burton Fair he was approached by an employee of defendant with regard to filming his act and he requested that the performance not be filmed; that notwithstanding such request his entire performance was filmed and shown on defendant's television station; that "the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property".

Defendant's answer (App. p. 5) admitted that plaintiff's performance had been filmed and broadcast. In separate defenses the answer challenged the sufficiency of the complaint to state a claim upon which relief can be granted, and alleged that its conduct was protected "by the rights of freedom of speech and freedom of the press as contained in that Constitution of the United States and the State of Ohio".

On March 11, 1974, defendant filed a motion for summary judgment (App. p. 7). That motion was supported by two affidavits and an exhibit.

The first affidavit (App. p. 8) was from George J. Masur, the representative of defendant who was respon-

sible for plaintiff's act having been filmed. The affiant stated that while at the Burton Fair on August 30, 1972 he had witnessed plaintiff's performance which "consisted of him being shot out of a cannon into a net located approximately 200 feet away". The affidavit reflects that plaintiff and Mr. Masur discussed the filming of plaintiff's act, that "plaintiff requested that his act not be filmed", and that Mr. Masur responded "although I did not intend to do so that day he had no right to restrict my right to film a newsworthy event". The following day Mr. Masur reported on his activities to the producer of defendant's Eyewitness News program, including plaintiff's stated objection to any filming, and he was directed to return to the fair and film plaintiff's performance. He did so, and submitted the film for use on that evening's eleven o'clock Eyewitness News.

The second affidavit (App. p. 11) was by David F. Patterson, a co-anchorman on the eleven o'clock Eyewitness News program. He stated that on the broadcast of September 1, 1972 a fifteen second news clip of plaintiff's act was telecast, and identified the script text he read while the film clip was being shown. The script was appended as an exhibit to the Patterson affidavit (App. p. 12).

On April 29, 1974 an entry issued from the trial court granting defendant's motion for summary judgment. However, no opinion was issued upon such ruling so we do not have the benefit of the trial court's reasoning.

Plaintiff prosecuted an appeal to the Eighth District Court of Appeals. In that proceeding it was asserted by plaintiff that "appellee's conduct is not protected by the First Amendment", thus raising the question presented herein. On July 10, 1975 the Court of Appeals reversed the decision of the trial court. While the ruling of the

three judges was unanimous, two separate opinions were rendered which proceeded on somewhat different grounds. Quite candidly, the opinions of the two judges went well beyond the issues which were briefed and argued, and certain of the points upon which reversal was based originated with the court.

Defendant then sought review in the Supreme Court of Ohio. In that proceeding defendant asserted a claim of federal constitutional privilege as a defense to plaintiff's asserted rights. On July 28, 1976, the Ohio Supreme Court issued its decision. The syllabus of opinion (through which the court officially speaks, 14 O. JUR. 2d, Courts §247) is as follows:

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.
2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.
3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

In the course of the court's opinion the rationale of the Court of Appeals (and particularly those matters raised *sua sponte*) as to the foundation for an actionable claim



for relief by plaintiff were essentially rejected. The Ohio Supreme Court posed the controlling issues as it perceived them to be:

Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and if so, was the television station privileged to do so? 47 Ohio St. 2d 224, 228.

As to the first proposition, it was held that the defendant's conduct constituted an actionable tort in Ohio. The right which the court found infringed was the "right of publicity", the first time such right had been recognized in Ohio. On this aspect of the action the court concluded as follows:

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, e.g., *Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.

We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of

publicity that anyone might over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area. 47 Ohio St. 2d 224, 232.

The court then proceeded to "the decisive issue in this case"—"whether the defendant had a privilege to film and televise the plaintiff's performance on its nightly news program, and if so whether that privilege was abused". For guidance on that issue the court turned to the rulings in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Based upon its analysis of those authorities the court concluded that defendant was entitled, as a matter of law, to immunity under a claim of privilege for its tortious conduct. Drawing from the two cited authorities the concept that the news media possesses a privilege to disseminate news of matters of public interest the court concluded thusly:

... it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that the taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point of view, that position is, of course, understandable, for a film or a videotape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must



be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. *No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires.* The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. (Emphasis added.) 47 Ohio St. 2d 224, 235.

Justice Celebrezze dissented. He asserted that the majority's reliance upon the *Time, Inc. v. Hill* and *New York Times* rulings was conceptually improper, and that even if relevant, the failure to consider the effect of the later decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), undermined the conclusion reached by the majority. He further disagreed with the majority's determination that final judgment was proper, pointing out five factual issues which he maintained precluded a determination that defendant was entitled to summary judgment as a matter of law.

### SUMMARY OF ARGUMENT

The Supreme Court of Ohio, while recognizing a new common law cause of action for the appropriation for private use or benefit the name or likeness of another by way of the right to the publicity value inherent in

a professional performer's act, improperly applied First Amendment immunities to a T.V. station that broadcast a performer's entire performance on its nightly news program. The basis for decision of the Ohio Supreme Court was that the T.V. station had the privilege to report in its newscast matters of legitimate public interest unless the reporting was for some nonprivileged private use or done with actual malice. The reasoning of that Court is fundamentally unsound because there does not exist any right for the broadcast media to publish an *entire* performance of a professional performer on its news program under the protection of any yet recognized interpretation of First Amendment rights as applied to newsworthy events of legitimate public interest.

The First Amendment protections granted to the news media have been principally in cases involving defamation and traditional invasion of privacy, wherein false light matters and matters that are not before the public are improperly put there. The right of publicity is a new and different branch of the traditional right of privacy branches. The right of publicity involves a proprietary right inherent in the entire "act" or "performance" of a professional entertainer. It is the right to govern how, when, where, for what remuneration and under what circumstances a professional entertainer's entire act is to be published. It is the right of a performer to protect against an unauthorized publication of his entire professional performance which could diminish its originality, and its commercial value, and this is easily distinguishable from a right to protect against the publication of private matters or of publication of matters in a false light or of defamation.

There is no question that the broadcast media has the privilege and right to report newsworthy events of

public interest and wide latitude to criticize and comment thereupon. However, there can be no privilege for a complete appropriation by filming and broadcasting in its entirety on a "news" program an entertainer's performance under the guise of newsworthiness and matters of legitimate public interest.

## **ARGUMENT**

### **I. Introduction**

Insofar as petitioner has been able to determine this action presents a question of first impression nationally<sup>1</sup>—what is the proper scope of the First Amendment privilege to be extended to the electronic broadcast media in defense of a claim of appropriating a performer's right of publicity. Petitioner contends that the Ohio Supreme Court's reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),<sup>2</sup> for guidance is erroneous. Primarily, the considerations which pertain to this suit for invasion of a "right of publicity" are so dissimilar to those presented in the foregoing authorities as to render the precedents of marginal value. Even as-

1. *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) and *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952), which bear some factual resemblance to this suit, are distinguishable in that each turns upon the construction of §51 of the New York Civil Rights Law, Consol. Laws, c.6, which was held to afford no protection against invasions of the right of publicity and/or waiver by the plaintiff of any right of publicity. Thus, the question presented herein was not reached in those actions.

2. Although defendant interposed Article I, Section 11 of the Ohio Constitution in defense of plaintiff's claim it is beyond argument that the decision of the Ohio Supreme Court is premised upon First Amendment considerations as announced in those decisions.

suming some direct relevance for *Time, Inc. v. Hill*, the Ohio Supreme Court erred in failing to recognize that its scope has been substantially affected by later decisions of this Court. Petitioner submits that this action represents an appropriate vehicle for a fresh look at *Time, Inc. v. Hill* and its continuing viability.

### **II. The Ohio Supreme Court Has Extended Virtual Total Immunity Under the First Amendment for Tortious Invasion of the Right of Publicity**

Before undertaking critical analysis of the validity of the Ohio Supreme Court's application of the First Amendment principles enunciated in *New York Times v. Sullivan*, *supra*, and *Time, Inc. v. Hill*, *supra*, to this suit, it is essential to consider other aspects of the state court decision.

By the decision in this case Ohio has, for the first time, recognized as a matter of state law a protected "right of publicity",—the right of exclusive control in a performer over the publicity given to his performances. Such holding respects the right of a performer to sell that which he may have spent years developing and refining. The Ohio court specifically held that plaintiff's public performance at the Burton Fair was not an abandonment (waiver) of his right of publicity, so as to permit defendant to film and broadcast his entire performance over his stated objection.

It is thus plain that plaintiff's complaint was, as a matter of state law, sufficient to state a claim upon which relief could be granted. The termination of the action by way of a summary judgment was by virtue of the Ohio Supreme Court's conclusion that defendant possesses a First Amendment privilege insulating it from liability.



While the opinion of the Ohio Supreme Court appears to speak in terms of a qualified immunity, in that two exceptions to the general rule of immunity are articulated, petitioner submits that in fact (and particularly as applied to this case) the effect of the ruling is to virtually totally insulate the broadcast media from liability. Of the two qualifications engrafted upon the basic immunity, one is a contradiction in terms while the other is a practical nullity.

The basic standard of immunity adopted by the Ohio Supreme Court is that the broadcast media "has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private". It is thereafter stated that such privilege can be lost if the "actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use". Disregarding the virtually insurmountable evidentiary problems this exemption would present, such proposition is a complete non-sequitur. If a broadcaster is entitled to claim the benefit of a First Amendment privilege upon a finding that the matter televised was of "public interest", there is simply no possibility of a further finding that the broadcast was "for some other private use" for purposes other than reporting in order to overcome that privilege. A finding that the broadcast was reporting of a matter of public interest would in and of itself preclude the conclusion that such a broadcast was an appropriation for private use. Hence, the very definition of the privilege precludes the existence of the qualification.

The second stated qualification is that immunity would not be recognized if "the actual intent was to injure the performer". While plaintiff would argue that in any case in which the broadcast media appropriates a performance

without compensation the law should imply intent to inflict a pecuniary injury (which is in fact the very basis of the right of recovery for an invasion of the right of publicity), it is plain that such was not the intent of the Ohio Supreme Court. If such a standard of intent was controlling, every case of appropriation (in which the media deprives the performer of his right to bargain for the sale of the reproduction of his act) would result in absolute liability. The very fact of the defendant's verdict in this case negates such possibility. Consequently, we must accept the view that intent to appropriate and intent to injure the performer are not corollaries, from which it necessarily follows that the Ohio Supreme Court envisioned a true subjective intent to injure. How could such intent be proved, particularly in response to the obvious argument that added public exposure necessarily benefits a performer? Petitioner submits that this amorphous possibility of a basis for recovery is of no real value whatsoever.

If, as petitioner contends, the rule of immunity adopted by the Ohio Supreme Court is virtually absolute the implications are staggering. It extends to the broadcast media carte blanche to appropriate and transmit all or parts of public performances without compensation to the performer. That eventuality is virtually invited by the Ohio Supreme Court's holding that any "standard which would bar the depicting [of] either an entire occurrence or an entire discrete part of a public performance" is constitutionally impermissible. Such an immunity goes far beyond any First Amendment privilege heretofore recognized by any court. It runs counter to admonitions from this Court regarding the sacrificing of individual rights in the name of freedom of the press. This Court has recognized the validity of the proposition that:



Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight, and injured parties should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand. *Buckley v. New York Post Corp.*, 373 F.2d 175, 182. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

Justice Fortas, dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 420 (1967), expressed the matter thusly:

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be of no service to freedom of the press, but an invitation to public hostility to that freedom.

See also, *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968).

### III. The First Amendment Privilege As Defined Under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1967), Is Not Applicable to the Defense of the Tort of Invasion of a Performer's Right of Publicity

As petitioner proposes to demonstrate, the rationale of the *New York Times v. Sullivan*, *supra*, and *Time, Inc. v. Hill*, *supra*, are simply not applicable to a case involving invasion of a performer's right of publicity. The Ohio Supreme Court was led into a misapplication of those decisions by viewing this action as but a simple continuation of the long-standing problem of resolving the conflicting interests of a "free press" and an individual's "right of privacy". The trap into which the Ohio Supreme Court has fallen in arriving at its decision is one of relying upon labels in a syllogistic line of reasoning<sup>3</sup>: this action presents a conflict between "free press" and "right of publicity"; the "right of publicity" is a part of the "right of privacy"; *Time, Inc. v. Hill* deals with the matters of "free press" and "right of privacy"; it therefore follows that the rule of *New York Times v. Sullivan* as applied in *Time, Inc. v. Hill* should apply in this case.

The fundamental error of the Ohio Supreme Court, which makes the foregoing line of reasoning only superficially attractive, is that it failed to recognize that while the "right of publicity" is sometimes categorized as a part of the "right of privacy", it has such distinctive attributes as to set it apart from other interests often lumped together

3. Such an approach runs afoul of this Court's recent warning that in First Amendment cases "[w]hatever their general validity, use of such [generalized] subject matter classifications to determine the extent of constitutional protection afforded . . . may too often result in an improper balance between the competing interests". *Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154, 164 (1976).

under the general heading of the "right of privacy". It is those distinctions which call for the formulation of First Amendment standards specifically geared to the case at bar and others of a like nature.

Dean Prosser, in his review of the "right of privacy", concludes that it is not one tort, but a complex of four distinct kinds of invasion of four different interests which are tied together by a common name "but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff." PROSSER, *LAW OF TORTS* (4th Ed., 1971) p. 804. It is the failure to recognize the distinctiveness of the four separate torts which has led to confusion in decisional authorities. *Id.*, at p. 814.

While it has been said that for nearly twenty years the courts have been haunted by the "myth" that the tort of appropriation (which encompasses the right of publicity) involves an actual right of privacy, Pember and Teiter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L.R. 57, 88 (1974), there are several well-reasoned decisions which do observe the conceptual distinction which eluded the court below. One of the first cases in which the "right of publicity" was recognized is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), the court holding that such right was "in addition to and independent of" the classical right of privacy. The same conclusion was reached by the Third Circuit in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1955). An oft-cited decision in this area, in which the court found the distinction between the right of publicity and other torts classified under the right of privacy to be of controlling importance, is *Uhlaender v. Henrickson*, 316 F. Supp. 1277 (Minn. 1970). Quite recently it has been said:

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation on the other hand are different in theory and scope. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

See also, *Canessa v. J. I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967).

What are these fundamental differences of which the courts and commentators speak? They are essentially that the tort of appropriation, involves the commercial exploitation of a person before the public eye, whereas the traditional forms of invasion of privacy involve placing before the public either something theretofore secret or putting a "false light" upon facts previously known. PROSSER, *supra*, at p. 814.<sup>4</sup> The traditional forms of "right of privacy" do, in fact involve considerations of matter otherwise private. The "right of publicity" involves the usurpation of something already before the public.

Let us now consider the two authorities relied upon by the Ohio Supreme Court in order to determine whether their rationale is supportive of application to an action for invasion of right of privacy. While the primary authority drawn is *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that ruling in turn draws from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is, therefore, appropriate that the inquiry start with the *New York Times* decision.

4. The "false light" doctrine is somewhat akin to, though not necessarily identical with, the torts of libel and defamation.



In *New York Times* the plaintiff, a state police official, brought a state libel action, predicated upon a paid advertisement carried in the defendant's newspaper. The advertisement related to civil rights activities and, in part, was critical of certain police actions and public officials in Montgomery, Alabama. In the state court the plaintiff recovered a \$500,000 jury verdict.

When the action came before this Court, the historical antecedents of the First Amendment privilege granted the press were reviewed. Based thereon the Court approached the merits of the action "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". 376 U.S. 254, 270. Premised upon the reality that "erroneous statement is inevitable in free debate, and that it must be protected if the freedom of expression are to have the 'breathing space' that they 'need to survive'", 376 U.S. 254, 271-272, the rule was articulated that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless it is established that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, pp. 279-280. The Court noted that such conditional privilege was analogous to the privilege granted a public official when he is sued for libel by a private citizen, *id.*, p. 282, and observed that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship' ". *Id.*, p. 279.

The *New York Times* rule was extended beyond the limits of public officials in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).<sup>5</sup>

The plaintiff therein instituted a "false light" suit under a New York civil rights statute which covered invasions of "right of privacy". Under that statute, as construed by the state courts, plaintiff was entitled to a recovery upon a showing of material and substantial falsification. *Id.*, p. 386. The factual predicate of the suit was that Life magazine had reported on the opening of a play, which was based on a book, which was based on an actual event. The book, however, was a fictionalized version of the actual events, and contained matter not responsive to the actual happenings. The magazine article made it appear as though the plaintiff had suffered through the events portrayed in the fictionalized version. In the trial court plaintiff recovered a judgment, which was affirmed on appeal in the state courts.

The plaintiff's judgment was vacated upon review by this Court. In an opinion expressing the views of five members of the court Justice Brennan found the principles of *New York Times* applicable. Premised upon the proposition that "the guarantees for free speech and press are not the preserve of political expression or comment upon public affairs", *id.*, at p. 388, the opinion holds that as to matters of "public interest" in "public personalities"

5. Intervening between the *New York Times* and *Time, Inc.* decisions are the rulings in *Garrison v. Louisiana*, 376 U.S. 64 (1964), *Henry v. Collins*, 380 U.S. 358 (1965), and *Rosenblatt v. Baer*, 388 U.S. 75 (1966), in each of which the *New York Times* rule was applied to a fact situation involving criticism of public officials as to matters relevant to their public positions. It is worth noting that in *Rosenblatt* the court referred to the "motivating force" behind the *New York Times* decision as protection for the "strong interest in debate on public issues" and the strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". *Id.*, at p. 85.



the "actual malice" standard of *New York Times* to be controlling. It is stated that:

We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait. *Id.*, at p. 389.

The Court, however, took pains to note that the scope of the decision should not be read too broadly. It is stated that the application of the *New York Times* standard was not a matter of "blind application" but rather in the "discrete context" of the "application of the New York statute in cases involving private individuals". *Id.*, pp. 390, 391. It was further noted that "this is neither a libel action by a private individual nor a statutory action by a public official", *id.*, p. 390, and there is the suggestion that if such was the case a different standard than that of *New York Times* might be applied, the Court observing that in such cases the balancing of interests might call for consideration of the injured party's opportunity for rebuttal, and the state's interest in protection of the individual. *Id.*, p. 391. Justice Harlan, while concurring in the result, argued for the adoption of a less stringent standard than that of *New York Times*. He observed that the fact situation did not entail the "market place

of ideas" with which the court was historically concerned in First Amendment cases and that the plaintiff did not have an effective opportunity for rebuttal such as is available to a public official. *Id.*, at pp. 407-408.

The dissent of Justice Fortas, joined in by Chief Justice Warren and Justice Clark, finds the majority holding to be "exceedingly narrow", *id.*, p. 411. In urging affirmance, the opinion states:

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights. *Id.*, p. 420.

Petitioner submits that it should be self-evident that the standards of *New York Times v. Sullivan* and *Time, Inc. v. Hill* cannot apply to this case.

Both *New York Times* and *Time, Inc. v. Hill* involved the dissemination of false information. In this case the

dissemination is of a visual reproduction, a matter of truthful reproduction.

In both rulings the Court was quite concerned with protecting open debate on matters of genuine public interest and concern, and the inhibiting effect of a reasonable man standard. We are here dealing with the appropriation of the art of a public performer, and seeking responsibility from the broadcast media in respecting individual rights.

The "actual malice" standard of *New York Times* permits of a recovery upon proof that defendant acted with knowledge that the publication was false or with reckless disregard for the truth. While in this case the defendant acted with total disregard for plaintiff's stated objections, the avenue for recovery open under the "actual malice" test is not here available for there is no issue regarding truth or falsehood.

*New York Times* involved a public official's public acts. *Time, Inc. v. Hill* turned upon the construction of a specific state statute in relation to the First Amendment. No such considerations are present in this action.

A partial rationale for the immunity extended in *Time, Inc. v. Hill* was the burden of absolutely verifying the accuracy of the information put before the public. In this case the defendant intentionally set out to capture an event as it occurred, and knew full well what it was obtaining.

Plainly, the "right of publicity" is not equitable with the "right of privacy" with which this Court dealt in *Time, Inc. v. Hill*, insofar as the burdens the media faces in knowing that it is dealing honestly and fairly with individuals to be portrayed are concerned. The considerations which underlie the immunity extended in *New York*

*Times v. Sullivan* and *Time, Inc. v. Hill* do not warrant permitting this defendant to appropriate for its own purposes the entirety of petitioner's performance without being called to account for its actions. The wrong done to petitioner is so far removed from any situation this Court has previously considered that it requires the formulation of a First Amendment standard responsive to the rights and obligations of the press specifically premised thereon.

#### **IV. *Time, Inc. v. Hill* Has Been So Substantially Affected by Subsequent Decisions of This Court That Reliance Upon It Without Considerations of Those Rulings Is Erroneous**

In this case the Supreme Court of Ohio terminated its consideration of the First Amendment privilege to be accorded defendant with *Time, Inc. v. Hill*, *supra*. Even assuming the "actual malice" standard of *New York Times* to be relevant to this case, the failure of the Ohio court to consider subsequent decisions interpreting *New York Times* and *Time, Inc. v. Hill*, renders the conclusion reached erroneous.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court passed upon two actions which had been accepted for review in order to consider the impact of *New York Times* upon persons who were "public figures" but not public officials. *Id.*, at p. 134. While agreeing upon the results in each action, the Court was unable to agree upon a standard to be adopted. Justice Harlan, in an opinion joined in by Justices Stewart and Fortas, was in favor of a standard which would permit the imposition of liability upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by re-



sponsible publishers". *Id.*, at p. 155. Other justices urged the application of the *New York Times* standard, while Justices Black and Douglas argued for abandonment of *New York Times* in favor of total immunity for the press from libel suits. *Id.*, at p. 172. In the opinion of Justice Harlan the following is found:

... to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility [citation omitted] as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc. v. Hill*, *supra*, 385 U.S. at 390, we counselled against "blind application of *New York Times Co. v. Sullivan*. . . ." *Id.*, at p. 148. (Emphasis added.)

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. *Id.*, at p. 150.

The next significant decision of this Court was in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).<sup>6</sup> Its

6. Between the *Curtis Publishing* and *Rosenbloom* decisions the *New York Times* rule was applied in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), *Greenbelt Cooperative Publishing Assn. v. Bressler*, 398 U.S. 6 (1970), *Monitor Patriot v. Roy*, 401 U.S. 265 (1971), *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971). However, each of those actions involved considerations basically similar to those of the *New York Times* case itself.

importance does not lie so much in the holding, but rather in its subsequent repudiation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As was the case in *Curtis Publishing Co. v. Butts*, *supra*, the action was concluded in this Court by a plurality. The question presented upon which a majority of the justices could not agree was what First Amendment standard should apply in the case of a defamation action brought by an individual who was neither a public official nor a "public figure", but who was involved in a matter of "public concern". The judgment of the Court was rendered in an opinion by Justice Brennan, who wrote in favor of applying the *New York Times* "actual malice" test.

Within three years this Court decided the *Rosenbloom* issue contrary to the plurality opinion therein. *Gertz v. Robert Welch, Inc.*, *supra*. In *Gertz* the plaintiff in a libel action was found to be neither a public official nor a public figure. Nevertheless, the district court, applying the *New York Times* standard, entered judgment in the defendant's favor. The court of appeals affirmed that ruling "because it read *Rosenbloom* to require the application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed". *Id.*, at p. 330. That ruling was reversed, this Court holding "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them". *Id.*, p. 343.

In refusing to extend the *New York Times* standard to the case of a private individual the Court stated:

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If



it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy on unconditional and indefeasible immunity from liability for defamation. [citations omitted]. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. *Id.*, at p. 341.

Among the considerations noted by the Court in determining to allow recovery under a standard less demanding than *New York Times* were, that a private individual does not have available the same channels of effective communication which a public official possesses in order to rebut falsehoods and that public figures are often voluntarily in the forefront of public controversies in order to influence their resolution, thus inviting attention and comment with the attendant risk that such may be false and damaging.<sup>7</sup> *Id.*, pp. 344-345. In assessing the plaintiff's status as a private individual the Court noted that he had neither accepted public office or assumed an influential role in ordering society. *Id.*, p. 345.

In determining to allow a private individual a remedy under state law under any standard which does not impose liability without fault, *id.*, p. 347, this Court abandoned

7. These considerations can, by analogy, be applied to petitioner. Once defendant has appropriated petitioner's entire act petitioner has no effective means of countering that conduct. While defendant's status as a public performer invites comment and criticism (favorable or unfavorable, true or false) it does not invite appropriation. If status as a "public performer" is to be equated with status as a "public figure" for First Amendment purposes no performer would be safe from having an entire performance appropriated without compensation.

as the determinative factor for application of the *New York Times* standard whether the material published concerned "an issue of public or general interest". In the majority opinion in *Gertz* the decision in *Time, Inc. v. Hill* was considered. The opinion states that in that case "the Court applied the *New York Times* standard to actions under an unusual state statute", and that such "holding was not an extension of *New York Times* but rather a parallel line of reasoning applying that standard to this discrete context". *Id.*, p. 334 (fn. 6). Petitioner submits that the overall import of the *Gertz* decision, and particularly these latter aspects thereof, are reflective of a narrowing back of the *New York Times* standard to virtually the context of the action in which it arose. More importantly, they contain a clear warning to other courts as to the limited initial scope of the *Time, Inc. v. Hill* decision and its continuing efficacy, a warning which was disregarded by the Ohio Supreme Court.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court again cautioned against too broad readings of *New York Times* and *Time, Inc. v. Hill*.

In *Cantrell*, a "false light" case, the court found that liability was properly imposed under existing standards as applied to that action, but took the occasion to note that:

... this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. 419 U.S. 245, pp. 250-251.

A similar caution was extended in the *Cox Broadcasting* ruling, in which recovery was denied to a plaintiff alleging invasion of privacy by broadcast of matter derived from court records: "We should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph". 420 U.S. 469, 489. A fair reading of *Cox Broadcasting* fully reflects the narrowing of the *New York Times* standard effected by *Gertz v. Robert Welch, Inc.*, *supra*. In fact, Justice Powell (concurring) in his review of decisional authorities observes that the *Gertz* decision "calls into question the conceptual basis of *Time, Inc. v. Hill*". 420 U.S. 469, 498.

The past term this Court refused to extend "the rather drastic limitations worked by *New York Times*". *Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154, 164 (1976). Justice Powell (joined by Justice Stewart) concurring, refers to the majority opinion therein as adhering to the principles of the *Gertz* decision. 47 L. Ed. 2d. 154, 169. Justice Brennan, dissenting, argues that the *Gertz* standards should not have been applied to the action under consideration, but recognizes that in *Gertz* the Court "cut back on the scope of application of the *New York Times* privilege as it had evolved through the plurality opinion in *Rosenbloom v. Metromedia, Inc.*" 47 L. Ed. 2d 154, 175.

It should be evident that the Ohio Supreme Court's application of the *New York Times* standard through *Time, Inc. v. Hill* without consideration of this Court's later rulings is a "blind application," as cautioned against by this Court almost ten years ago, and totally disregards the import of the latest constructions of the First Amendment by this Court. The doctrine of *New York Times* had its genesis in, and is being returned to, the protection

of the press to freely publish critical information regarding persons whose roles in society are of real importance to an informed citizenry. Petitioner submits that *Time, Inc. v. Hill* is an anomaly, the significance of which has been too broadly applied and the viability of which has been substantially undercut. It is time to do that which the Ohio Supreme Court did not, and recognize that in light of the *Gertz* decision *Time, Inc. v. Hill* has virtually no significance beyond its peculiar facts.

#### **V. Specific First Amendment Standards Should Be Adopted Applicable to the Relationship of Public Performers and the Broadcast Media**

As has been maintained throughout, petitioner's basic thesis is that the role of a performing artist and such an artist's right to control his or her art are so unique that the question of the broadcast media's First Amendment rights in relation thereto must be looked at anew. This is not to say that prior precedents are meaningless, but rather that they should be drawn upon taking into account the special nature of the performer's status.

While there is no doubt that a performing artist is a "public figure" in the sense that he or she is voluntarily in the public eye (and therefore is fair game for critical commentary on his or her talents under traditional First Amendment standards) such fact should not be justification for the broadcast media to be granted total immunity from liability for appropriating without permission and/or compensation the entirety of the performer's performance. What is called for in actions such as this is a First Amendment standard that will afford the broadcast media an opportunity to inform the public as to the presence and activities of a performer (with commentary thereon if desired) and yet which will respect the performer's right



to control the "right of publicity". A balance must be struck which will both grant the broadcast media reasonable First Amendment protection and demand of the broadcast media responsibility in respecting the rights of performing artists to market the talents they possess.

Petitioner submits that such a standard would fall somewhere between the "actual malice" test of *New York Times* applicable to public officials and the liability based upon any standard of fault test of *Gertz* applicable to private individuals. The existing classifications of "public figure" and "private individual", against which the press' rights and responsibilities have heretofore been measured, are inappropriate for incorporation into such a standard. As presently understood, a performing artist cannot be considered as coming within the ambit of either category. Petitioner would contend, however, that in defining a standard for the broadcast media's responsibility for appropriation of a performing artist's work the relevant considerations fall closer to that end of the spectrum pertaining to private individuals. The performing artist is a public figure only in the sense that he appears professionally before the public as an entertainer but he is not a public figure like a person who is active in social issues, political issues or other matters which generate public interest and commentary. He is truly a professional public entertainer who makes a living by selling his act which he created through his own talent and efforts.

The test which petitioner would espouse is essentially as follows: When a performing artist has a "right of publicity" guaranteed under state law the broadcast media may claim a First Amendment privilege for appropriation of all, or substantially all of a performance only if such act of appropriation is reasonably undertaken in discharge of the broadcast media's right and responsibility to inform

the public of the happening of a newsworthy event.<sup>8</sup> If the broadcast media goes beyond such bounds it should be answerable in damages, the measure of which would be controlled by state law, to the performer.

If such a standard was to be applied to this action it is manifest that questions of fact for a jury are presented. Such questions would include whether the broadcast and publication was of an event that was a newsworthy event constituting a matter of legitimate public interest, and did the publication constitute a verbatim re-creation of an entertainer's entire performance. If the matter published is not one that is newsworthy and a matter of legitimate public interest, then there can be no First Amendment privilege to publish matters otherwise private to which a right of privacy or right of publicity would otherwise attach. Likewise, if the publication was a verbatim re-creation of an entire performance of a professional public entertainer, then it represents an appropriation, or invasion of the right of publicity.

There may be occasions when these factual questions are determined in favor of the broadcast media, as when, for example, assume that the petitioner was shot out of his cannon and missed the net fracturing arms and legs. In that case the performance could become a newsworthy event of legitimate public interest justifying the publication of his entire act; or similarly, if Evel Knievel was to rocket-cycle over a tank of live man-eating sharks and didn't make it, the news media would probably be privileged to publish the re-creation of his last performance.

---

8. The potential "chilling", self-censoring, effect of such a rule would be minimal. Petitioner submits that the instances in which the broadcast media, acting in a responsible fashion, would have to make a value judgment as to the capturing of an entire performance as part of news reporting should be few and far between.



Petitioner cannot improve upon the comment of Judge Day of the Cuyahoga County Court of Appeals in the within action where he stated (A33 of Petition):

"Moreover the prospect of a total performance being captured on audio-visual tape without permission and then repeated on television without redress puts the consequences of such an appropriation of property in a rather appalling perspective."

The adoption of the rule which petitioner advances herein is not only for his benefit, but for the protection of all performing artists. There is no denying that the factual predicate of this action is novel. But the decision of the Ohio Supreme Court is not limited to the facts of this case and represents a substantial danger to the proprietary rights of every performing artist if it remains unchecked.

### CONCLUSION

Petitioner submits that the ruling of the Ohio Supreme Court is plainly erroneous insofar as its First Amendment implications are concerned. Petitioner prays that this Court vacate the judgment of the Ohio Supreme Court, announce an appropriate First Amendment standard relevant to this action and others of a similar nature, and remand this action to the trial court for further proceedings. As the issues of state law in this suit have been resolved and the question presented is purely one of federal constitutional dimension a remand to the Ohio Supreme Court would serve no useful purpose.

Respectfully submitted,

JOHN G. LANCIONE

SPANGENBERG, SHIBLEY, TRACI

AND LANCIONE

1500 National City Bank Building  
Cleveland, Ohio 44114

*Attorneys for Petitioner*

MAR 26 1977

MICHAEL PODAK, JR., CLERK

---

# Supreme Court of the United States

---

October Term, 1976

No. 76-577

---

HUGO ZACCHINI,

*Petitioner,*

*vs.*

SCRIPPS-HOWARD BROADCASTING COMPANY,

*Respondent.*

---

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO

---

---

## BRIEF FOR RESPONDENT

---

EZRA K. BRYAN

DON H. PACE

LAWRENCE V. LINDBERG

BAKER, HOSTETLER & PATTERSON

1956 Union Commerce Building

Cleveland, Ohio 44115

(216) 621-0200

*Counsel for Respondent*

---

## TABLE OF CONTENTS

Table of Authorities	ii
Question Presented	1
Relevant Constitutional Provision Which Was Not Reproduced By Petitioner	2
Counterstatement of the Case	2
Summary of Argument	4
Argument	6
I. Introduction	6
II. This Case Should Be Dismissed For Want of a Federal Question	9
A. The Ohio Supreme Court decision rests on adequate and independent state grounds	9
B. In defining the scope of common law rights the Ohio Supreme Court may look for guidance to decisions of this Court	13
C. Any decision by this Court on the merits would constitute merely an advisory opinion	15
III. The News Media Privilege Recognized By the Ohio Supreme Court Is Neither Novel, Un- reasonable Nor Inconsistent With Federal Constitutional Principles	18
A. The privilege afforded the press by the Ohio Supreme Court is consistent with the news media privilege traditionally recognized in Ohio and other jurisdic- tions	18
B. The privilege applied by the Ohio court is consistent with First Amendment principles articulated by this Court	21



## II

C. The Ohio court did not totally immunize the press from right of publicity claims	24
IV. Any Remand For Further Proceedings in This Case Must Be to the Ohio Supreme Court	26
Conclusion	28

## TABLE OF AUTHORITIES

### Cases

<i>AAFCO Heating and Air Conditioning Company v. Northwest Publications, Inc.</i> , 321 N.E.2d 580 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1976)	14-15, 27
<i>American Ry. Express Co. v. Kentucky</i> , 273 U.S. 269 (1927)	10
<i>Beck v. Ohio</i> , 379 U.S. 89 (1964)	12
<i>Cassidy v. Glossip</i> , 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967)	5, 12
<i>Chapadeau v. Utica Observer-Dispatch, Inc.</i> , 38 N.Y.2d 196, 341 N.E.2d 569 (1975)	15
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975)	21
<i>Current Audio, Inc. v. RCA Corp.</i> , 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972)	20
<i>Dept. of Mental Hygiene v. Kirchner</i> , 380 U.S. 194 (1965)	11, 27
<i>Ellis v. Dixon</i> , 349 U.S. 458 (1955)	11
<i>Fairport, Painesville &amp; Eastern R.R. Co. v. Meredith</i> , 292 U.S. 589 (1934)	10, 11
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964)	24
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	5, 7, 14, 15, 21, 22, 27

## III

<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	5, 16
<i>In re Royall</i> , 125 U.S. 696 (1888)	26
<i>Jankovich v. Indiana Toll Road Comm'n</i> , 379 U.S. 487 (1965)	12
<i>Jenkins v. Dell Publishing Co.</i> , 251 F.2d 447 (3d. Cir.), cert. denied, 357 U.S. 921 (1958)	23
<i>Johnson v. Scripps Publishing Co.</i> , 32 Ohio L. Abs. 423, 18 Ohio Op 372 (C.P. 1940)	4, 19
<i>Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Marketing Ass'n</i> , 276 U.S. 71 (1928)	11
<i>Liles v. Gaster</i> , 42 Ohio St. 631 (1885)	25
<i>Man v. Warner Bros., Inc.</i> , 317 F. Supp. 50 (S.D.N.Y. 1970)	17, 20
<i>Martin v. F.I.Y. Theatre Co.</i> , 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P. 1938)	4, 18
<i>Minnesota v. National Tea Co.</i> , 309 U.S. 551 (1940)	27
<i>Murdock v. Memphis</i> , 87 U.S. 590 (1874)	15
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	13, 14, 18, 21
<i>Paulsen v. Personality Posters, Inc.</i> , 59 Misc. 2d 444, 299 N.Y.S.2d 501 (S. Ct. 1968)	20
<i>Peagler v. Phoenix Newspapers, Inc.</i> , 26 Ariz. App. 274, 547 P.2d 1074 (1976)	15
<i>Perkins v. Benguet Consolidated Mining Co.</i> , 342 U.S. 437 (1951)	12
<i>Regents of Univ. System of Georgia v. Carroll</i> , 338 U.S. 586 (1950)	11
<i>Rosemont Enterprises, Inc. v. Random House, Inc.</i> , 58 Misc. 2d 1, 294 N.Y.S.2d 122 (S. Ct. 1968), aff'd, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969)	19, 20
<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966)	22
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29 (1971)	14, 15

IV

<i>Southern Ry. Co. v. Kentucky</i> , 284 U.S. 338 (1932)	26
<i>Stone v. Essex County Newspapers, Inc.</i> , 330 N.E.2d 161 (Mass. 1975)	15
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	7, 13, 14, 21
<i>Torski v. Mansfield Journal Co.</i> , 100 Ohio App. 538, 137 N.E.2d 679 (1956)	25
<i>Walker v. Colorado Springs Sun, Inc.</i> , 538 P.2d 450 (Colo.) cert. denied, 423 U.S. 1025 (1975)	14
<i>Young v. That Was The Week That Was</i> , 312 F. Supp. 1337 (N.D. Ohio 1969)	4
<i>Zacchini v. Scripps-Howard Broadcasting Company</i> , 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976)	4, 9, 13, 14, 18, 24, 25

**Texts**

36 C.J.S. <i>Federal Courts</i> §268 (1960)	10
14A F. Poore, <i>CYCLOPEDIA OF FEDERAL PROCEDURE</i> , §69.77 (3d ed. 1965)	26
Note, 62 COLUM. L. REV. 822 (1962)	27
14 OHIO JUR. 2d <i>Courts</i> §247 (1955)	5
34 OHIO JUR. 2d <i>Libel and Slander</i> §58 (1958)	25

**Constitutions and Statutes**

Ohio Constitution, Article I, Section 11	2, 4
United States Constitution, First Amendment	1, 5, 6, 7, 8, 12, 13, 15, 16, 21, 22

# Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,

*Petitioner,*

*vs.*

SCRIPPS-HOWARD BROADCASTING COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO

**BRIEF FOR RESPONDENT**

## QUESTION PRESENTED

Whether, in a case of first impression which recognizes a new common law right of publicity, the Ohio Supreme Court, without federal intervention, may recognize a news media privilege to report on a matter of public interest which affords the protection required by the First Amendment as interpreted by the United States Supreme Court.

## RELEVANT CONSTITUTIONAL PROVISION WHICH WAS NOT REPRODUCED BY PETITIONER

Constitution of Ohio — Article I, Section 11:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

## COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case summarizes both the facts of the case and the proceedings to date. While Petitioner's summary is essentially accurate, certain undisputed facts relevant to the decision of the Ohio Supreme Court are not fully stated. These facts are as follows:

In August and September of 1972, Petitioner Hugo Zacchini regularly performed his "human cannonball" act for members of the general public attending the Geauga County Fair, in Burton, Ohio (App. pp. 9-10). His performance lasted about fifteen seconds, during which he was projected out of a cannon-like object into a net some two hundred feet away (App. p. 9). No separate admission fee was charged to view his act and his performance was staged in an open grandstand area for the benefit of all persons in general attendance at the fair (App. p. 9). Reporters and news cameramen were admitted to the fair *without charge* by the fair's promoters so that the fair would receive publicity from the news coverage (App. p. 10). The promoters to whom Petitioner sold his act

made no effort to restrict news coverage of Respondent's act; in fact, by admitting reporters and cameramen free of charge, the promoters encouraged such coverage (App. p. 10).

On September 1, 1972, a freelance news reporter for Respondent attended the Geauga County Fair and filmed Petitioner's performance over his verbal objection (App. p. 10). Petitioner's act had generated substantial public interest at the fair and, in keeping with Respondent's commitment to present a broad range of news and information to the public, Respondent determined that activities at the fair, including the public performance of Petitioner's act, would be of interest to its viewers and would call the public's attention to the fair's attractions (App. p. 10).

Respondent broadcast a fifteen second news film clip of Petitioner's act *once* on its eleven o'clock Eyewitness News program on September 1, 1972 (App. p. 11). While the film clip was being shown newscaster David Patterson described the act as follows:

This . . . now . . . is the story of a *true spectator sport* . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . . (App. p. 12) (emphasis in original script).

This single news use of a fifteen second film clip of Petitioner's performance is the sole basis for Petitioner's claim against Respondent.



## SUMMARY OF ARGUMENT

The decision of the Ohio Supreme Court in this case is one of state law. The Ohio Supreme Court held for the first time that under the common law of Ohio a "performer of a 'human cannonball' act has a right in the publicity value of his performance, and the appropriation of that right over his objection *without license or privilege* is an invasion of his privacy." *Zacchini v. Scripps-Howard Broadcasting Company*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976) (syllabus 2) (emphasis added). In recognizing the "right of publicity", the Ohio Supreme Court simultaneously applied a concomitant news media privilege as a defense to that right. This privilege was stated as follows:

A TV station has a privilege to report in its newscast matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual. *Id.* at 224, 351 N.E.2d at 455 (syllabus 3).

This privilege is one of state law, not federal constitutional law. It is an extension of the state constitutional and common law privilege afforded the news media in Ohio in right of privacy cases since as early as 1938. OHIO CONSTITUTION, art. I, §11; *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P. 1938); *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 18 Ohio Op. 372 (C.P. 1940). See also *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969). In articulating this privilege, the Ohio Supreme Court looked to the rationale behind the decisions of this Court for guidance. Nevertheless, the right of the performer and the privilege of the news media as set forth in the syllabi

of the Court<sup>1</sup> constitute the decision of Ohio's highest court as to the extent of protection to be afforded both performers and the news media under the laws of Ohio. Since adequate and independent nonfederal grounds for the Ohio court's ruling exist, a review of the decision by this Court would be inappropriate. *Herb v. Pitcairn*, 324 U.S. 117 (1945).

This Court has previously recognized that state courts are free to afford protection to the press provided such protection meets minimum federal constitutional standards. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Thus the Ohio Supreme Court is free to recognize a new common law right and to adopt, as an integral part of that right, privileges and defenses emanating from state common law and state and federal free press guarantees so long as the privileges and defenses meet minimum federal standards.

A decision by this Court on the merits of the federal constitutional question proffered by Petitioner would constitute only an advisory opinion to the Ohio Supreme Court. While Petitioner has asked this Court to intervene and announce specific federal standards which must apply to right of publicity claims arising under state law, the articulation of such standards under the facts of this case would be highly inappropriate. Only when a state supreme court in creating common law (i) fails to meet the minimum constitutional protections which must be accorded the press under the First Amendment and (ii) grants recovery against the media, should this Court, in the exercise of federal question jurisdiction, intervene to define and apply those minimum constitutional standards.

In this case, the privilege afforded the press by the

<sup>1</sup> The syllabus of the Ohio Supreme Court is the official pronouncement of the court. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); 14 OHIO JUR. 2d Courts §247 (1955).

Ohio Supreme Court is consistent with the privilege traditionally applied in right of privacy cases arising in Ohio and other jurisdictions. It is furthermore grounded upon the same free press concerns which this Court has long considered to be so fundamentally important to our free society. If this Court, despite the absence of federal question jurisdiction, elects to advise the Ohio Supreme Court on the minimum privilege required under the federal Constitution, Respondent submits that under the First Amendment the news media is privileged to make news use of matters of public interest which, under state law, might otherwise be protected by an individual's right of publicity.<sup>2</sup>

## ARGUMENT

### I. Introduction.

In this case the Ohio Supreme Court was free to refuse to recognize *any* right of Petitioner or to completely immunize the news media in right of publicity actions without raising a federal question. Nevertheless, Petitioner attempts to create the illusion that this case involves a conflict between an Ohio common law right and the First Amendment when no such conflict exists. Simply stated, the Ohio Supreme Court recognized a "right of publicity" in Petitioner, a public performer, as ancillary to Ohio's long established right of privacy. The court at the same time recognized that in the State of Ohio there exists a qualified privilege for Respondent, a member of the news

<sup>2</sup> At some later date when this Court articulates the minimum federal standard to be applied in right of publicity cases, it should find that the second basis upon which a performer may defeat the media privilege in Ohio is unconstitutional. Since under these facts the Ohio court did not defeat the privilege afforded Respondent, the case is not an appropriate one to consider the constitutionality of the "intent to injure" standard adopted by the Ohio court.

media, to report the public presentation of a performer's act so long as the report constitutes news use and is not made with the intention to injure the performer.

Petitioner, being a "maker" and not a disseminator of news, neither has nor is claiming to have any First Amendment or other federal right that has been violated. Petitioner's complaint is that the Ohio court in *seeking guidance* from First Amendment decisions of this Court adopted for Ohio a more liberal news media privilege than is arguably required by the decisions of this Court. Petitioner seeks to transmogrify the Ohio court's decision approving the rationale of certain federal opinions into a ruling made under compulsion of those opinions. Such tortured reasoning does not create a conflict between Ohio common law and First Amendment rights. This absence of conflict alone disposes of this appeal.

Petitioner places great emphasis on the libel case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), suggesting that the narrowing of the public interest test in libel cases involving private individuals calls into question the Ohio court's reliance on the *rationale* of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in formulating a privilege applicable to right of publicity cases arising under Ohio law (Brief for Petitioner, p. 27). Petitioner conveniently ignores the fact that *Gertz* itself holds that the states in developing their common law are free of federal restraint provided they do not restrict the news media more than permitted by the minimum standards of First Amendment protection sanctioned by this Court. This too defeats Petitioner's finely spun argument.

Petitioner seeks to have this Court set not the minimum but rather absolute protections which the states in developing their common law may afford the news media. Petitioner would require this Court's affirmative participation in the formulation of state common law rights. Two



facets of the relief he seeks emphasize this. First, Petitioner urges that this Court should adopt absolute (not minimum) First Amendment standards applicable to the relationship of public performers and the media (Brief for Petitioner, p. 33). Second, Petitioner prays that this Court not only reverse the decision of the Ohio Supreme Court, but also that the case be remanded directly to the trial court. *Id.* Petitioner, in one blinding flash, seeks to make this Court a general appellate court for the states in common law cases. Such is not the function of this Court, and the proper disposition of the case is to dismiss the writ of certiorari as improvidently granted.

Finally, the news media privilege granted by the Ohio Court is neither novel, unusual nor inconsistent with the First Amendment freedoms so essential to our free society. It constitutes an extension to right of publicity cases of the news media privilege traditionally applied in Ohio right of privacy cases. It is further consistent with the news media privilege applied by other state and federal courts in other right of publicity cases and with the First Amendment decisions of this Court. Any less of a news media privilege would violate the First Amendment.

While conceding that Respondent has the "privilege and right to report newsworthy events of public interest," Petitioner argues that the scope of the privilege applied by the Ohio court results in "virtual total immunity" for the media in right of publicity cases (Brief for Petitioner, pp. 9-10, 13). Such is not the case. Petitioner is protected against both non-news use of his public performance by the media as well as the use of his performance in a news context with the intent to injure him. In fact, the latter basis for defeating the privilege adopted but not applied under the facts of this case is more than that to which Petitioner is constitutionally entitled.

## **II. This Case Should Be Dismissed For Want of a Federal Question.**

### **A. The Ohio Supreme Court decision rests on adequate and independent state grounds.**

It is fundamental that the development of common law is the concern of state, not federal, courts. Implicit in the power of the state courts to recognize new common law rights is the power to define the parameters of those rights. In the instant case the power of the Ohio Supreme Court to recognize a cause of action for invasion of the right of publicity carries with it the unabridged right to delineate the prerequisites to such a claim and the privileges which constitute defenses thereto.

This case was one of first impression under the laws of Ohio. In considering Petitioner's claim, the Ohio Supreme Court recognized the right of publicity as but one facet of Ohio's right of privacy and, like the right of privacy, not absolute. 47 Ohio St. 2d at 231-32, 351 N.E.2d at 459-60. The court further recognized specific affirmative defenses which, under Ohio law, may be asserted to defeat the right of publicity. The court held that a performer may abandon the right by "effectively dedicating it to the public" or by failing to give "reasonable notice to the public." 47 Ohio St. 2d at 232, 351 N.E.2d at 460. The Ohio court further recognized that in cases involving the news media the right of publicity must be subject to the media's "privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity . . ." 47 Ohio St. 2d at 224, 351 N.E.2d at 455 (syllabus 3).

In defining the affirmative defenses which apply to this newly recognized right, the Ohio Supreme Court was properly exercising its function as the sole arbiter of state law. This Supreme Court has neither the responsibil-



ity for the development of Ohio law nor the power to interfere with the limitations placed by the Ohio Supreme Court on common law causes of action unless some federal right of Petitioner is infringed.

As a general rule, the highest court of a state may administer the common law according to its own understanding and interpretation, without liability to a review in the United States Supreme Court, unless some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. 36 C.J.S. *Federal Courts* §268 at 739 (1960).

This Court, in *American Ry. Express Co. v. Kentucky*, 273 U.S. 269 (1927), acknowledged the role of the state courts in matters of common law. In declining to reverse a decision of the Court of Appeals of Kentucky, this Court held:

As there was no controlling statute the state court necessarily determined the rights and liabilities of the parties under the general rules of jurisprudence which it deemed part of the law of Kentucky and applicable in the circumstances. It went no further. No earlier opinion was overruled or qualified and no rule was given any retroactive effect. *Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common.* *Id.* at 272 (emphasis added).

Similarly, in *Fairport, Painesville & Eastern R.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court declined to review the doctrine of last clear chance as applied by the Ohio courts. Appellant argued that the holding with respect to the doctrine was contrary to the great weight of American authority. This Court ruled, however, that it was precluded from considering appellant's contention as the case concerned a matter of Ohio common law and presented no federal question for review.

The federal Safety Appliance Act . . . imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. *Id.* at 598.

Other decisions of this Court affirm the paramount authority of the states in matters of common law. See, e.g. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Marketing Ass'n*, 276 U.S. 71, 89 (1928) (" . . . a State may freely alter, amend or abolish the common law within its jurisdiction."); and *Regents of Univ. System of Georgia v. Carroll*, 338 U.S. 586 (1950).

This Court has consistently held that its initial responsibility in reviewing any case from a state court is to ascertain "whether that court's decision 'might' have rested on a nonfederal ground, for if it did we must decline to take jurisdiction." *Ellis v. Dixon*, 349 U.S. 458, 459 (1955). If the Court is "unable to say with any degree of certainty" that a judgment is based on a federal right, it will decline to review the case, since the "Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, . . ." *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194, 196-97 (1965). The party seeking review must demonstrate to the Court that it does indeed have jurisdiction of the case. *Id.* Unless the opinion of the state court indicates that the court "'felt constrained to rule as it did'" or that it was ruling "'under compulsion of federal law'", this Court will defer to adequate and independent

state grounds for the decision. *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 492 (1965).

In the instant case the syllabus of the decision of the Ohio Supreme Court is the official opinion of the court and states the law of the case. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). This Court has recognized that the Ohio Supreme Court "speaks as a court only through the syllabi of its cases". *Beck v. Ohio*, 379 U.S. 89, 93 n.2 (1964). Matters outside the syllabus are not to be regarded as decision since "only the syllabus necessarily carries the approval of that court." *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 441 (1952). Only when the accompanying opinion unequivocally states that the Ohio court is prohibited by federal law from reaching any conclusion other than that contained in the syllabus will this Court exercise federal question jurisdiction. *Id.* at 443.

Petitioner assumes that the privilege applied by the Ohio court was not one of state law but of federal law, and that the Ohio court felt compelled by federal law to deny recovery to Petitioner (Brief for Petitioner, p. 10 n. 2). However, the syllabi in this case in no manner suggest that the Ohio court felt it was prohibited from granting recovery to Petitioner. The deliberate lack of reference in the syllabi to the First Amendment indicates that the court did not feel constrained by federal law but rather that it looked to general free press principles for guidance in formulating the state law privilege.

Nor does the accompanying opinion of Justice Stern suggest that the court "felt constrained" by the First Amendment to rule as it did or that it acted "under compulsion of federal law" in prohibiting Petitioner from recovering. Rather, the opinion suggests that the Court is recognizing a new common law right subject to specific

conditions and privileges which afford proper protection to the press.

Respondent submits that it is apparent from a consideration of the foregoing authorities and the syllabi and opinion of the Ohio court that the writ of certiorari in this case was improvidently granted and that the decision of the Ohio Supreme Court should be allowed to stand as the Ohio court's expression of the proper defenses to be applied to common law right of publicity cases arising under the laws of Ohio.

**B. In defining the scope of common law rights the Ohio Supreme Court may look for guidance to decisions of this Court.**

Petitioner states his primary objection to the Ohio Supreme Court's decision as follows:

Petitioner contends that the Ohio Supreme Court's reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for guidance is erroneous. (Brief for Petitioner p. 10) (emphasis added).

Respondent submits that the contrary is true. A state supreme court in formulating defenses to common law causes of action is free to consider pronouncements of this Court, particularly in the First Amendment area.

In this case the Ohio Supreme Court adopted the basic rationale of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as applied in *Time, Inc. v. Hill*, *supra*, that "freedom of the press inevitably imposes certain limits upon an individual's right of privacy." 47 Ohio St. 2d at 233, 351 N.E.2d at 460. The Ohio court concluded that the reasoning of this Court in *Time, Inc. v. Hill* was sound and that a similar privilege should apply to right of publicity cases arising under Ohio law:



Just as the press was held to be privileged to report matters which would otherwise be private, if they are of public concern, so too, it must be held privileged when an individual seeks to publicly exploit his talents while keeping the benefits private. The same privilege exists in cases where appropriation of a right of publicity is claimed . . . . 47 Ohio St. 2d at 234, 351 N.E.2d at 461.

The Ohio Supreme Court's reliance on *Time, Inc. v. Hill* and *New York Times Co. v. Sullivan* for guidance in formulating the rule of law for Ohio with respect to privacy claims parallels the use made by other state courts of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in granting state news media defenses to libel claims brought by private individuals. Guided by this Court's pronouncement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual", several state courts have found the rationale of the disapproved *Rosenbloom* decision persuasive. They have accordingly adopted a *Rosenbloom* or modified *Rosenbloom* test to be applied in their states in defamation cases involving private individuals. In *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo.), cert. denied, 423 U.S. 1025 (1975), the Colorado Supreme Court concluded that the simple negligence test allowed by *Gertz* would cause a chilling effect upon the news media and "would create a strong impetus toward self-censorship [by the news media], which the First Amendment cannot tolerate." *Id.* at 458 (quoting from *Rosenbloom v. Metromedia*).

Similarly, the Indiana Court of Appeals, in *AAFCO Heating and Air Conditioning Company v. Northwest Pub-*

*lications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1976), determined that the *Rosenbloom* standard is the appropriate standard to govern defamation claims brought under the laws of Indiana. Other similar cases include *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975), where the Supreme Judicial Court of Massachusetts ruled that punitive damages may not be awarded in a defamation action on any state of proof, even though permissible under *Gertz*; *Peagler v. Phoenix Newspapers, Inc.*, 26 Ariz. App 274, 547 P.2d 1074 (1976); and *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975).

It is the function of this Court in the First Amendment area to insure that no state court denies the minimum constitutional protection required by the First Amendment. So long as they meet minimum federal constitutional standards, the state courts in right of publicity cases have the freedom permitted them under *Gertz* to delineate the protection to be afforded the press under state law.

**C. Any decision by this Court on the merits would constitute merely an advisory opinion.**

Petitioner has asked this Court to intervene in a state matter and formulate specific First Amendment standards to govern the relationship between public performers and the broadcast media (Brief for Petitioner, p. 29). However, under the facts of this case an opinion rendered by this Court on First Amendment issues would be merely advisory. This Court has always held that it will not issue advisory opinions, even in cases where it believes that the lower court has wrongly decided a federal question, if an adequate nonfederal ground for the lower court's decision also exists. *Murdock v. Memphis*, 87 U.S. 590, 634-636 (1874). Since the decision of the



Ohio court in this case was founded on state law, the resolution of the competing interests of performers and the press under federal law is not properly an issue.

The words of Justice Jackson contained in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), are instructive:

*This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (citations omitted) \* \* \* The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion. (emphasis added).*

This is a most inappropriate case in which to advise the state courts on the minimum First Amendment standard applicable to right of publicity cases. First, the facts of this case have such narrow and singular application that a decision on the merits would have little, if any, general application. The news media has no interest in reproducing lengthy segments of an individual's performance, and in only the most unusual case (such as exists here) will any substantial portion of a performance be used in a news context. Petitioner attempts to intrigue this Court by asserting that the interests of public performers and personalities are being markedly limited by the privilege applied by the Ohio court (Brief for Petitioner, p. 13). This assertion could not be farther from

the truth. Virtually all right of publicity complaints raised by performers relate to the commercial use of their name or likeness. It is the *commercial* use which is the bane of performers, not legitimate news use which the vast majority of performers seek and benefit from.<sup>3</sup>

Second, performers such as the Petitioner have sufficient means to prevent media coverage of their performances if they really do not want coverage. In performers' contracts with promoters, the promoters can be required to include explicit prohibitions against mechanical reproductions on tickets and programs. If a performer sells his performance to a promoter as Petitioner did in this case, the performer can, at the contractual stage, determine the conditions and limitations to be placed on audience reproduction of the performance.

Thirdly, Respondent's use of the film clip of Petitioner's act was *de minimis*. In *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970), a Federal District Court found that even *commercial* use of a forty-five second film clip of plaintiff's entire musical performance did not provide the basis for a claim under New York's right of privacy statute. The Court's holding in *Man, Id.* at 53, is directly in point here:

Finally, the incidental use of plaintiff's forty-five second performance in defendants' motion picture of this public event is surely *de minimis* [sic]. Cf. *University of Notre Dame du Lac v. Twentieth Century Fox Film Corp.*, *supra*; *Damron v. Doubleday, Doran & Co.*, 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct., N.Y. Co. 1928), *aff'd* 226 App. Div. 796, 234 N.Y.S. 773 (1st Dep't 1929).

Although the Ohio Supreme Court did not have to rely upon the *de minimis* theory in dismissing Petitioner's

<sup>3</sup> In this case the very favorable publicity given Petitioner by Respondent could only enhance his career and the marketability of his act. (See App. p. 12).

claim since the news media privilege precluded recovery under the facts of this case, the court nevertheless suggested that Petitioner's claim was insubstantial. 47 Ohio St. 2d at 234 n. 5, 351 N.E.2d at 461 n. 5.

It is difficult to imagine a less appropriate case for this Court to advise state courts as to minimum federal constitutional standards which must be afforded the press in right of publicity claims arising under state common law. For this additional reason, Respondent suggests that the writ of certiorari to the Ohio Supreme Court should be dismissed as improvidently granted.

### III. The News Media Privilege Recognized By the Ohio Supreme Court Is Neither Novel, Unreasonable Nor Inconsistent With Federal Constitutional Principles.

#### A. The privilege afforded the press by the Ohio Supreme Court is consistent with the news media privilege traditionally recognized in Ohio and other jurisdictions.

In Ohio the media's privilege to report on matters of general and public interest did not begin with *New York Times Co. v. Sullivan*. Since 1938 state courts in Ohio have applied a news media privilege to disseminate matters of public interest as a defense to invasion of privacy claims. In *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 69, 10 Ohio Op. 338, 341 (C.P. 1938), an Ohio court recognized the following privilege as a defense to a right of privacy claim:

[The right of privacy] does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the publication would be of a public benefit, as in the case of a candidate for public office.

Two years later this privilege was again applied in *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 431, 18 Ohio Op. 372, 379-80 (C.P. 1940):

All authorities which recognize "right of privacy" as a legal right for the violation of which there is a legal remedy agree upon certain fundamentals namely:

(a) The right of privacy does not prohibit publication of matter which is of public or general interest, . . .

In its detailed analysis of the competing societal and constitutional interests present in this case, the Ohio Supreme Court reasoned that the "public interest" privilege afforded the press in the more traditional privacy actions should also be available as a defense to right of publicity claims. Thus, the decision of the Ohio Supreme Court merely reaffirmed the general theory of news media privilege that has been applied for forty years as a defense to privacy claims in Ohio, and extended that privilege to the newly recognized right of publicity.

The privilege applied by the Ohio court is also consistent with news media privileges applied to right of publicity claims arising in other jurisdictions. In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (S. Ct. 1968), *aff'd*, 32 App. Div. 2d 892, 301 N.Y.S.2d 948 (1969), a New York court protected the publication of a biography of Howard Hughes against a claim that his right of publicity was violated.

The publication of a biography is clearly outside the ambit of the "commercial use" contemplated by the "right of publicity" and such right can have no application to the publication of factual material which is constitutionally protected. *Just as a public figure's "right of privacy" must yield to the public interest so too must the "right of publicity" bow where such*



conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest. *Id.* at 6, 294 N.Y.S. 2d at 129 (emphasis added).

This news media privilege has been applied to appropriation cases in New York regardless of whether the basis of the claim is New York's right of privacy statute or the common law right of publicity. *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) (plaintiff denied recovery on free press grounds for the commercial use of his forty-five second musical performance); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972) (unauthorized taping and commercial distribution of an interview with Elvis Presley does not constitute violation of his right of publicity); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (S. Ct. 1968) (commercial sale of presidential poster of comedian Pat Paulsen privileged as against right of publicity claim).<sup>1</sup>

<sup>1</sup> Petitioner has sought to distinguish *Man v. Warner Bros., Inc.* and similar New York cases by arguing that the claims were governed by New York's right of privacy statute and not a common law right of publicity. (Brief for Petitioner, p. 10 n. 1). This distinction is inaccurate for New York Courts have held that both the statutory right of privacy and the common law right of publicity are limited by an identical free press privilege. *Paulsen v. Personality Posters, Inc.*, *supra* at 450-51, 299 N.Y.S. 2d at 508-509; *Rosemont Enterprises, Inc. v. Random House, Inc.*, *supra* at 6, 294 N.Y.S.2d at 129.

**B. The privilege applied by the Ohio court is consistent with First Amendment principles articulated by this Court.**

In *Time, Inc. v. Hill* this Court acknowledged that freedom of the press imposes certain necessary limitations on the right of privacy. The Court reasoned that a broadly defined freedom of the press is constitutionally required to provide the breathing space essential to fruitful exercise of this most important First Amendment freedom. 385 U.S. at 389. These principles were recently reaffirmed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), where the Court concluded that the First Amendment "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records" even if such disclosure places in the public domain delicate and private matters.<sup>2</sup>

Petitioner's contention that *Gertz v. Robert Welch, Inc.* and its progeny call into question the Ohio court's use of the rationale of *Time, Inc. v. Hill* in a state right of publicity case is unsound. In *Gertz*, this Court held that the actual malice standard of *New York Times Co. v. Sullivan* abridged the states' legitimate interest in providing a legal remedy for falsehoods injurious to the reputation of a private individual. 418 U.S. at 345-46. The *Gertz* court reemphasized the paramount importance of a free press as the foundation of a free society, but rec-

<sup>2</sup> The *Cox* decision suggests that truthful reports of matters of public interest will be afforded the strongest constitutional protection:

[T]he constitutional necessity of recognizing a defense of truth is equally implicit in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen, 420 U.S. at 499. (Powell, J. concurring).



ognized that in a free society there is a strong state interest in protecting the good name and dignity of the individual. As expressed by Justice Stewart in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J. concurring):

[The law of defamation] reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system.

The *Gertz* decision was founded on the Court's desire to forge an accommodation of these sometimes competing, essential interests. While Petitioner may have certain commercial rights in his "human cannonball" act, they hardly qualify as essential to "any decent system of ordered liberty". In this case Petitioner has gained the right of recovery against those making commercial use of his name and likeness. *Commercial* appropriation is the foundation of the right of publicity and is its most important facet. The privilege articulated by the Ohio court does not affect this aspect of the right of publicity.

The Ohio Supreme Court recognized the significant distinction between defamation claims made by private individuals and right of publicity claims asserted by public performers and personalities. In the Ohio court's view, there was no fundamental societal interest which required a significant abridgment of First Amendment freedoms in right of publicity cases. The court wisely reasoned that the "chilling effect" which results from inadequate free press protection in libel and false light cases would similarly affect the news media if a strong privilege were not af-

forded the press in defense of right of publicity claims. This chilling effect acts as an actual restraint on the press in the form of self censorship. A broadcaster who must constantly evaluate whether a jury would find his use of a performer's name or likeness "reasonably undertaken in discharge of the broadcast media's right and responsibility to inform the public of the happening of a newsworthy event" (Brief for Petitioner, pp. 30-31) will tend to limit the scope of news coverage given public performances and personalities.

Petitioner is asking this Court to (i) strip the media of the right to independently determine what constitutes news and (ii) narrowly define news so as to exclude material having entertainment value. Such action would have a profound adverse effect on the media.

Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged. *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d. Cir), *cert. denied*, 357, U.S. 921 (1958) (footnotes omitted).

This Court must not second guess in each case the manner and extent of news coverage given a public event. Such interference with the function of a free press, absent some fundamental competing interest, can only encourage further attempts to narrowly define and governmentally control what constitutes news.

C. The Ohio court did not totally immunize the press from right of publicity claims.

Although the Ohio court could have granted total immunity to the media in right of publicity cases without presenting any constitutional question, the Ohio court did not do so. Rather than "immunize" the press (See Brief for Petitioner, p. 11), the court recognized two bases for defeating the media privilege.

The first basis, that "the actual intent . . . was to appropriate the benefit of the publicity for some non-public use," provides a standard for determining whether news use is made of the performer's name or likeness. Under the facts of this case, the single use on Respondent's nightly news program of a fifteen second film clip of the performance is plainly a news use. See *Zacchini v. Scripps-Howard Broadcasting Company*, *supra* at 235, 351 N.E.2d at 461. Should the media, in a different case, broadcast on a commercial program a concert given by a professional entertainer, that use would be sufficient to establish intent to appropriate the benefit of the publicity for a non-privileged use.

The second basis for defeating the privilege, that "the actual intent of the media was to injure the individual," comports with the express malice limitation long applied by the Ohio courts in defamation actions.<sup>6</sup> Under Ohio

<sup>6</sup> Although it is unnecessary to reach the issue at this time, Respondent believes that the "intent to injure" standard allows the imposition of liability upon the press for the publication of even truthful reports if done with "ill-will" or "express malice". This Court has rejected the concept that liability can be imposed upon a mere showing of dislike or ill-will towards a plaintiff. *Garrison v. Louisiana*, 379 U.S. 64 (1964). Petitioner has unfortunately confused the concept of "intent to injure" or "express malice" with that of "actual malice" as defined by this Court. While Petitioner characterizes the Ohio court's opinion as allowing recovery only upon a showing of "actual malice" (See, e.g., Brief for Petitioner, p. 9), it is apparent upon a careful reading of the opinion that a lesser standard was applied.

law the privilege of the press to publish and disseminate news may be lost if the publication is made with express malice, that is, out of a sense of ill will, hatred or revenge. 34 OHIO JUR. 2d *Libel and Slander* §58 at 224 (1958). Ohio courts have long considered and applied this express malice test, which, like the Ohio Supreme Court's actual intent test, is a subjective one. E.g., *Liles v. Gaster*, 42 Ohio St. 631 (1885); *Torski v. Mansfield Journal Co.*, 100 Ohio App. 538, 137 N.E.2d 679 (1956). A court would have no more difficulty applying this basis for defeating the privilege in right of publicity cases than it has had in applying the express malice test in libel actions. For example, had Respondent's script alleged that Petitioner's act was a fraud, and had the film strip been edited so as to falsely show that Petitioner leaves the "cannon" prior to the explosion with the assistance of a spring-gun mechanism, Respondent's intent to injure Petitioner would be evident.

The Ohio court has not seriously limited Petitioner's rights by applying a privilege which recognizes the paramount concern our society has for freedom of the press. In the words of the Supreme Court of Ohio:

[T]he primary value which one society places upon the freedom of speech and of press requires that we reject [Petitioner's] viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires. 47 Ohio St. 2d at 235, 351 N.E.2d at 461. (emphasis added).



As the foregoing analysis establishes, the decision of the Ohio Supreme Court in this case extending to right of publicity cases the rule pertaining to privacy cases since 1938 is neither novel nor unreasonable and is consistent with fundamental free press concerns, both state and federal.

#### IV. Any Remand For Further Proceedings In This Case Must Be to the Ohio Supreme Court.

Petitioner's position that the United States Supreme Court can and should define the specific news media privilege to be applied under Ohio common law constitutes the single most novel proposition in his brief. His suggested procedural disposition of the case, however, is only slightly less extraordinary. Petitioner suggests that this Court deal directly with the Ohio Court of Common Pleas if any remand is necessary. While this Court may remand a federal case to either a Circuit Court of Appeals or a District Court, the Court's practice has always been to remand state cases to the highest state court for further proceedings not inconsistent with the opinion of the Court. Until the instant case, it had always been accepted that a state supreme court has the right and power to control proceedings in the inferior courts of that state. As stated in 14A F. POORE, CYCLOPEDIA OF FEDERAL PROCEDURE §69.77 at 149 (3d ed. 1965):

The state court is not required to submit the cause to new proceedings, if it has power to make a new judgment conforming to what was decided. The enforcement of the mandate upon lower state courts is within the power of, and will be left in the first instance to, the highest state court whence came the cause, and to which it was remanded on reversal for further proceedings. (footnotes omitted).

See *Southern Ry. Co. v. Kentucky*, 284 U.S. 338, 341 (1932). *In re Royall*, 125 U.S. 696, 697 (1888).

If this Court requires any further proceedings in this matter, the cause should be remanded to the Ohio Supreme Court in the first instance for disposition in a manner consistent with this Court's mandate. Thus, if this Court should choose to establish advisory federal constitutional standards applicable to right of privacy claims of this nature, the Ohio Supreme Court should be given an opportunity, *inter alia*, to (i) choose to expand upon the minimum federal standard for protection of the free press (See *Gertz v. Robert Welch, Inc.*, *supra*) or (ii) confirm that state common law or constitutional principles require a broader news media privilege in Ohio than the minimum allowed by this Court. (See, e.g., *AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, *supra*).

In accordance with well settled principles of judicial review, this Court should, in fact, remand the case to the Ohio Supreme Court before establishing any such advisory standard if the Court believes such standard must be defined in the context of this case. It is Respondent's position that the Ohio Supreme Court's decision is clearly one of state law. If this Court disagrees, it must ascertain that the decision is in fact grounded on federal law before treating any federal question. The Ohio Supreme Court is the appropriate state court to consult as to the basis for its decision. *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965), *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). See generally, Note, 62 COLUM. L. REV. 822 (1962). Unless the Ohio Supreme Court advises that its decision was compelled by its view of federal law, this Court should not act.

Thus, if this Court determines that further proceedings are required in this case, it should remand the case to the Ohio Supreme Court for disposition in accordance with its mandate.



**CONCLUSION**

For the foregoing reasons, Respondent respectfully submits that the writ of certiorari should be dismissed as improvidently granted or, alternatively, that the opinion of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

EZRA K. BRYAN

DON H. PACE

LAWRENCE V. LINDBERG

BAKER, HOSTETLER & PATTERSON

1956 Union Commerce Building

Cleveland, Ohio 44115

(216) 621-0200

*Counsel for Respondent*